

## JOSHUA ALMOND

jalmond@unc.edu • (240) 543-5712

Current Address: 203 Conner Dr. Apt 5, Chapel Hill, NC 27514

Permanent Address: 305 Bridle Crest Sq. NE, Leesburg, VA 20176

### EDUCATION

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**University of North Carolina School of Law** | Chapel Hill, North Carolina

*Juris Doctor*, expected May 2024

GPA: 3.755 (Top 15%)

- *North Carolina Banking Institute Journal*, Editor-in-Chief, Vol. 28, Published Note in Vol. 27
- Certificate of Merit Recipient, Earned the Highest Grade in both Copyright and Corporations Courses
- Eugene Gressman & Daniel H. Pollitt Oral Advocacy Award Recipient
- Marion A. Cowell, Jr. Scholarship Recipient
- Transactional and Corporate Law Association, President
- Honors Writing Scholar, assists in the instruction of first-year writing and research coursework

**James Madison University** | Harrisonburg, Virginia

*Bachelor of Music*, Music Industry, *summa cum laude*, May 2021

GPA: 3.912

- Elected by University Faculty as the 2021 School of Music Outstanding Graduate
- Teaching Assistant for the “Legal Aspects of the Music Industry” Class
- Phi Kappa Phi Honor Society
- Selected for the Truist Emerging Leader Certification

### EXPERIENCE

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**Potter Anderson & Corroon LLP** | Wilmington, Delaware

*Summer Associate*, Summer 2023

**The Regulatory Fundamentals Group LLC** | New York, New York (Remote)

*Legal Intern*, Summer 2022

- Directly assisted the company CEO by researching and analyzing financial regulations and the rapidly changing investment landscape through legal memoranda, frequently collaborating with industry professionals from universities and law firms to assist in research
- Maintained a database of financial regulations used to consult clients on their specific regulatory needs
- Prepared a private equity fund financing white paper used to educate clients on fund loan implications

**Dean Martin Brinkley, University of North Carolina School of Law** | Chapel Hill, North Carolina

*Legal Research Assistant*, Summer 2022

- Conducted and synthesized legal and historical research regarding the financial history of the University of North Carolina and drafted legal memoranda for the Dean of UNC Law School
- Completed administrative tasks involving the Dean’s preparation for his Legal History course

**Brevard Music Center** | Brevard, North Carolina

*Business Administrative Associate*, Summer 2021

- Assisted the Chief Financial Officer, Operations Manager, and Accounting Manager in administrative duties, employee onboarding of over 150 individuals, and daily accounting journal entries respectively
- Managed point-of-sale software and structured company sales processes for over 50 summer events
- Established and managed dozens of business relationships with product distributors and service providers

**Loudoun County Public Schools, Freedom High School** | South Riding, Virginia

*Music Instructor*, June 2017 - Present

- Designs the school’s marching band program and helps instruct the marching and concert ensembles

### INTERESTS

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Classical Music; Classically Trained French Horn Player; and 2016 Drum Corps International World Champion



THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL  
SCHOOL OF LAW

☎ 919-962-5106 | 📠 919-962-1170

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law.unc.edu

## Unofficial Transcript

**Note to Employers from the Career Development Office:** Grades at the UNC School of Law are awarded in the form of letters (A, A-, B+, B-, C, etc.). Each letter grade is associated with a number (A = 4.0, A- = 3.7, B+ = 3.3, B = 3.0, etc.) for purposes of calculating a cumulative GPA. An A+ may be awarded in exceptional situations. For more information on the grading system, including the current class rank cutoffs, please contact the Career Development Office at (919) 962-8102 or visit our website at <https://law.unc.edu/careers/for-employers/grading-policy-faq/>

Student Name: Joshua Almond

Cumulative GPA: 3.755

<u>Class</u>	<u>Description</u>	<u>Units</u>	<u>Grading</u>	<u>Grade</u>	<u>Grade Points</u>
<a href="#">LAW 201</a>	CIVIL PROCEDURE	4.00	Law - graded	A-	14.800
<a href="#">LAW 205</a>	CRIMINAL LAW	4.00	Law - graded	A	16.000
<a href="#">LAW 209</a>	TORTS	4.00	Law - graded	A-	14.800
<a href="#">LAW 295</a>	RES,REAS,WRIT,ADVOC I	3.00	Law - graded	B+	9.900

<u>Class</u>	<u>Description</u>	<u>Units</u>	<u>Grading</u>	<u>Grade</u>	<u>Grade Points</u>
<a href="#">LAW 204</a>	CONTRACTS	4.00	Law - graded	A-	14.800
<a href="#">LAW 207</a>	PROPERTY	4.00	Law - graded	B+	13.200
<a href="#">LAW 234A</a>	CONSTITUTIONAL LAW	4.00	Law - graded	A	16.000
<a href="#">LAW 296</a>	RES,REAS,WRIT,ADVOC II	3.00	Law - graded	A-	11.10

<u>Class</u>	<u>Description</u>	<u>Units</u>	<u>Grading</u>	<u>Grade</u>	<u>Grade Points</u>
<a href="#">LAW 210</a>	COPYRIGHT LAW	3.00	Law - graded	<b>A+</b>	12.900
<a href="#">LAW 211</a>	TRADEMARK LAW	3.00	Law - graded	<b>A-</b>	11.100
<a href="#">LAW 242</a>	EVIDENCE	4.00	Law - graded	<b>A</b>	16.000
<a href="#">LAW 280</a>	INCOME TAXATION	4.00	Law - graded	<b>A-</b>	14.80

<u>Class</u>	<u>Description</u>	<u>Units</u>	<u>Grading</u>	<u>Grade</u>	<u>Grade Points</u>
<a href="#">LAW 228</a>	BUSI ASSOCIATIONS	4.00	Law - graded	<b>A+</b>	17.200
<a href="#">LAW 250</a>	INSURANCE & DISASTER LAW	3.00	Law - graded	<b>B+</b>	9.900
<a href="#">LAW 266P</a>	THE LAW FIRM	3.00	Law - graded	<b>B+</b>	9.900
<a href="#">LAW 542</a>	LEGAL CRISIS MANAGEMENT	2.00	Law - graded	<b>A-</b>	7.400
<a href="#">LAW 551</a>	LEGAL RESPONSE FINANC. CRISES	2.00	Law - graded	<b>A</b>	8.000

<b>Total Grade Points</b>	<b>217.800</b>
<b>/ Units Taken Toward GPA</b>	<b>58.000</b>
<b>= GPA</b>	<b>3.755</b>

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to write on behalf of Joshua Almond, whom I understand has applied for a clerkship with you following his graduation from UNC School of Law in May 2024. I know Josh as a staff member of the *North Carolina Banking Institute* journal, for which I am the faculty advisor, and as the Editor-in-Chief for the coming year. Josh also recently received the Marion A. Cowell, Jr. Scholarship, awarded to the rising 3L on the journal who has provided the greatest dedication to the journal. Although all ten of our rising editors receive scholarships in the amount of \$10,000, this scholarship is one of the first two selected out of the ten (the second scholarship has a need component) and is an honor to receive.

As Josh's academic record demonstrates, he is an excellent student. He graduated summa cum laude from his undergraduate institution and has earned very high grades in law school. In fact, his current 3.75 GPA is very close to the GPA mark for the top 10% of his class at the end of the Spring 2023 semester, which was 3.776.

Maybe even more important for a judicial clerk is the ability to research, write, and make sense of complex topics. Josh developed his own topic for his journal note, which was recently published, on fraud in fund finance subscription facilities. With very little guidance from me, he was able to explain a sophisticated financing arrangement quite clearly and offer some nuanced suggestions for increased due diligence to avoid fraud in the future. I was very impressed.

To round it all out, Josh served this year as President of the law school's Transaction and Corporate Law Association, a large group of students. Josh has been helpful and professional when I have asked him for help in promoting our Center's events to TCLA.

Josh would be a wonderful addition to any office environment. He is pleasant, hard-working, respectful, and a great contributor to anything he undertakes. Josh has my highest recommendation and would make an excellent law clerk. Please contact me if I may provide any additional information (lbroome@email.unc.edu or 919-962-7066).

Best,

Lissa L. Broome

Burton Craige Distinguished Professor  
Director, Center for Banking and Finance

Lissa Broome - lbroome@email.unc.edu - 919.962.7066

February 7, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

With great pleasure and enthusiasm, I recommend my student Joshua Almond for a clerkship in your chambers.

Since he arrived at the Law School, I have come to know Josh both as an outstanding law student and as a wonderful human being. He served as one of my research assistants last summer, assisting me with a long term research project having to do with the financing of the University of North Carolina prior to the Civil War. He was an excellent colleague on an abstruse subject, a good and clear writer, and a thoughtful and creative critic of our work.

I presently have the honor of teaching Josh along with approximately 80 students in a four-hour course in Business Associations, which is taken by nearly every UNC Law School student. Josh is a joy to have in class. He brings a keen interest in corporate law, as his law review note for the *North Carolina Journal of Banking Law* reflects.

Finally, Josh and I have collaborated as musicians in a chamber ensemble, he on French horn and I on oboe. He is a terrific player and a sensitive musician. We have worked together on a trio by the 19th century German composer Carl Reinecke with a pianist friend of mine. We hope to perform this piece sometime in the course of the spring. The preparation of a work of chamber music is similar in many ways to the relationship between law clerks in a judge's chambers and with the judge himself or herself. As a former law clerk to Chief Judge Sam J. Ervin, III of the Fourth Circuit, who valued collegiality and camaraderie in his law clerks exceedingly, I can attest that Josh will fit in with others in your chambers and will serve you splendidly in the substantive part of your work.

Please let me know if I can answer any further questions about Josh. It would be my pleasure to speak to you by phone if it would be helpful to you.

Sincerely,

Martin H. Brinkley

Dean  
William Rand Kenan, Jr. Distinguished Professor

Martin Brinkley - martin92@unc.edu

June 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to share my strongest recommendation of UNC law student, Joshua Almond, for a clerkship with your Court. Josh is an exceptional student. He stood out from his excellent peers by demonstrating a passionate interest in learning every day. Last fall, Josh took both my Trademark and Copyright Law classes. He earned the very highest grade in Copyright Law and his exam was among the top five in trademark law. Perhaps more importantly, every day, Josh came to class organized, prepared, and engaged. I cannot think of a single instance when he disappointed me. I call on students frequently, and Joshua was always prepared and answered thoughtfully. His participation meaningfully contributed to what all the students in those classes learned.

Josh stood out for another reason. He was generous with his time and incredibly helpful to his peers, taking time to assist other students who found the material more challenging.

Josh's background in classical music helped him develop an exceptional work ethic and attention to detail. Another great benefit Josh acquired from this discipline is the ability to accept constructive advice and adapt his approach to find a better solution. I assigned a group take home project that very few, if any, students tackle well on the first effort. Joshua's first draft was good, but the way his team took my comments and integrated them to advance the final project showed his willingness to think through constructive advice and integrate it into his work product.

As a former law clerk, I know how important it is for you to find a trustworthy and dedicated candidate to support your work. If I were a judge looking for a law clerk, Josh would be among the first young lawyers I would call. In addition to his many academic strengths and work ethic, Josh has an easy-going personality and a wonderful sense of humor. If you are looking for a clerk who will do meticulous work, is eager to serve and passionate about learning, I am confident you will be grateful to have chosen Josh.

Please feel free to contact me at (919) 357-4316 or [dgerhardt@unc.edu](mailto:dgerhardt@unc.edu) if I can provide you with any additional information about this most worthy candidate.

Sincerely yours,

Deborah R. Gerhardt  
Professor of Law

Deborah Gerhardt - [dgerhardt@unc.edu](mailto:dgerhardt@unc.edu) - (919) 962-7219

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*Writing Sample Cover Sheet*

This writing sample is excerpted from my final written assignment for the course “Legal Response to Financial Crisis.” The paper was reviewed once by the course professor and once by another student. The rest of the editing was conducted independently outside of those two initial reviews.

This excerpt includes the background facts and primary argument of the paper. Omitted is the section applying my argument to a real-life scenario and rebutting possible challenges to the argument. Upon request, the full paper can be provided.

## FinTech Fiasco: An Approach to FDIC Misrepresentation Prevention Through the Lens of the Lanham Act

### I. INTRODUCTION

In the financial industry, confidence is the key ingredient to a healthy banking system, and subsequently a healthy economy.<sup>1</sup> For example, banks will borrow from clients through demand deposits, meaning that the depositors can withdraw their cash whenever they choose.<sup>2</sup> The bank will then lend out those deposits for a longer term to make a profit from the interest on the loan.<sup>3</sup> This process of “borrowing short” and “lending long” allows for the efficient use of money in our economy because deposits that would ordinarily sit and do nothing can contribute to societal development.<sup>4</sup> None of this would be possible if customers were not confident in their bank to safely hold their money and give them access to their cash when necessary.<sup>5</sup>

Enter the Federal Deposit Insurance Corporation (“FDIC”). To help maintain public confidence in the banking system, customer deposits of up to \$250,000 in FDIC-member banks are insured by the FDIC, protecting their deposits in the case of the bank’s failure.<sup>6</sup> This insurance allows depositors to feel comfortable lending their money to an FDIC-member institution, and so far, no covered depositor has ever lost a penny.<sup>7</sup>

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<sup>1</sup> See Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 12 (2009) (“Perhaps the most dangerous consequence of this economic crisis is that our collective confidence in our nation’s future, the economy’s resilience, our productivity and entrepreneurial spirit, and our ability to achieve the widely sought after American dream has been badly shaken and tarnished to a significant degree.”).

<sup>2</sup> See William Bednar & Mahmoud Elamin, *Rising Interest Rate Risk at US Banks*, ECONOMIC COMMENTARY, <https://www.clevelandfed.org/publications/economic-commentary/2014/ec-201412-rising-interest-rate-risk-at-us-banks> (“Banks borrow short and lend long. They often borrow, for example, by taking demand deposits, such as checking and savings deposits, which must be paid back whenever depositors ask for them. On the other hand, most of the money they lend out is tied up in long-term loans, such as mortgages.”).

<sup>3</sup> *Id.*

<sup>4</sup> See *What is the Economic Function of a Bank?*, FED. RESERVE BANK OF S. F. (July 2001), <https://www.frbsf.org/education/publications/doctor-econ/2001/july/bank-economic-function/> (explaining how banks lend to financial institutions, individuals, or governments who need the money for investments or other purposes).

<sup>5</sup> See John C. Dugan, *Addressing the Fundamental Banking Policy Problem of Runs: Effectively Subordinating Large Amounts of Long-Term Debt to Short-Term Debt to End “Too-Big-to-Fail”*, 22 N.C. BANKING INST. 11, 16 (2018) (explaining how prudential regulation is intended to promote confidence in banks and the banking system).

<sup>6</sup> *About*, FDIC, <https://www.fdic.gov/about/> (last visited Feb. 26, 2023).

<sup>7</sup> *Id.*; *Symbol of Confidence*, FDIC (last visited Feb. 26, 2023), <https://www.fdic.gov/consumers/assistance/protection/depaccounts/confidence/symbol.html>.



However, as technology continues to drive significant change in the financial industry, the FDIC-insured status of some financial institutions has become ambiguous.<sup>8</sup> For example, cryptocurrency exchanges continue to make statements regarding the FDIC-insured status of certain products and accounts.<sup>9</sup> In reality, these cryptocurrency exchanges are not FDIC-insured institutions, and their accounts and products are not insured.<sup>10</sup>

To mitigate this confusion, the FDIC relies on Section 18(a)(4) of the Federal Deposit Insurance Act entitled “False Advertising, Misuse of FDIC Names, and Misrepresentation to Indicate Insured Status.”<sup>11</sup> Further, the FDIC released a regulation with additional guidance regarding the misrepresentation of statements involving FDIC-insured partner institutions, motivating financial technology companies (“FinTechs”) to be unquestionably clear about their insured status.<sup>12</sup> Even with this current regulatory scheme, crypto exchanges and other FinTechs are still confusing customers regarding their insured status.<sup>13</sup>

This note analyzes a novel approach to enforcing FDIC-related false advertising and misrepresentation. Because the FDIC monitors the use of its name to reduce consumer confusion and keep uninsured institutions from trading off their goodwill,<sup>14</sup> applying a regulatory scheme that reflects federal trademark law may provide the FDIC with a more expansive enforcement mechanism. This paper addresses registration of the marks “Federal Deposit Insurance Corporation” and “FDIC” as word marks, and the official FDIC sign as a design mark. By treating these as trademarks, the FDIC could bring broad claims against infringers who either confuse consumers or dilute the FDIC’s reputation in the public’s

<sup>8</sup> See Saule T. Omarova, *Dealing with Disruption: Emerging Approaches to Fintech Regulation*, 61 WASH. U. J.L. & POL’Y 25, 34 (2020) (“By putting increasing pressure on the existing regime of financial regulation and supervision, the rise of fintech exposed the need for revisiting the broader regulatory philosophy underlying and guiding that regime.”).

<sup>9</sup> See Weiner Brodsky Kider PC, *FDIC Issues Cease and Desist Letters for Deposit Insurance Misrepresentations*, JD SUPRA (Mar. 9, 2023), <https://www.jdsupra.com/legalnews/fdic-issues-cease-and-desist-letters-5434397/> (explaining the most recent release of cease and desist letters sent to cryptocurrency exchanges and other websites making misrepresentations).

<sup>10</sup> *Id.*

<sup>11</sup> Federal Deposit Insurance Act § 2[18], 12 U.S.C. § 1828(a)(4).

<sup>12</sup> Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 12 C.F.R. § 328.2(a)(3) (2022).

<sup>13</sup> Weiner Brodsky Kider PC, *supra* note 9.

<sup>14</sup> See *Symbol of Confidence*, *supra* note 7 (emphasizing that all deposits are “backed by the full faith and credit of the United States government”).

eyes.<sup>15</sup> Additionally, enforceability against impermissible use would replace the current knowledge-based scienter requirement with a quasi-strict liability test for infringement.<sup>16</sup>

This note proceeds in five parts. Part II analyzes the application and effectiveness of the current regulatory scheme for FDIC false advertising and misrepresentation, particularly involving FinTechs.<sup>17</sup> Part III examines the differences between a potential trademark-based enforcement scheme and the current regulatory scheme.<sup>18</sup> Part IV analyzes the effect of the proposed scheme on FinTechs that the FDIC is currently pursuing.<sup>19</sup> Part V presents the conclusion.<sup>20</sup>

## II. BACKGROUND

Although the FDIC was created by the Banking Act of 1933,<sup>21</sup> all current legislation governing the operation of the FDIC is housed in the Federal Deposit Insurance Act of 1950.<sup>22</sup> Seven factors are listed in Section 6 of the Federal Deposit Insurance Act to determine if a depository institution qualifies for FDIC insurance.<sup>23</sup> This includes (1) the financial history and condition, (2) adequacy of the capital structure, (3) future earnings prospects, (4) general character and fitness of management, (5) risk to the deposit insurance fund, (6) convenience and needs of the community to be served, and (7) consistency of

<sup>15</sup> See Lanham Act § 32(1)(a), 15 U.S.C. § 1114(1)(a) (listing the basis for the trademark infringement claim); *id.* § 1125(c) (listing the basis for the trademark dilution claim).

<sup>16</sup> See Travis R. Wimberly & Giulio E. Yaquinto, *The Infringer's Mental State: Open Questions for Trademark Litigants*, AM. BAR. ASS'N. (Jun. 30, 2021), [https://www.americanbar.org/groups/intellectual\\_property\\_law/publications/landslide-extra/infringer-mental-state/](https://www.americanbar.org/groups/intellectual_property_law/publications/landslide-extra/infringer-mental-state/) ("Liability requires only that the infringer's conduct created a 'likelihood of confusion' among consumers, after all.>").

<sup>17</sup> See *infra* Part II.

<sup>18</sup> See *infra* Part III.

<sup>19</sup> See *infra* Part IV.

<sup>20</sup> See *infra* Part V.

<sup>21</sup> See Banking Act of 1933, ch. 89, 48 Stat. 162 (codified at 12 U.S.C. § 227) (demonstrating how the FDIC was created through this act, but was later reorganized under the Federal Deposit Insurance Act of 1950).

<sup>22</sup> See Federal Deposit Insurance Act § 2[1], 12 U.S.C. § 1811 ("There is hereby established a Federal Deposit Insurance Corporation . . . which shall insure, as hereinafter provided, the deposits of all banks and savings associations which are entitled to the benefits of insurance under this chapter, and which shall have the powers hereinafter granted.").

<sup>23</sup> *Id.* § 1816.

corporate powers with the FDI Act.<sup>24</sup> The bank will qualify for FDIC insurance if these factors are resolved favorably towards the depository institution.<sup>25</sup>

If the depository institution qualifies for FDIC member status, it must display the FDIC official sign by twenty-one days after the institution became insured.<sup>26</sup> In addition, the short title “Member of FDIC” or “Member FDIC,” or the official sign of the corporation must be included in all advertising “that either promote[s] deposit products and services or promote[s] non-specific banking products and services offered by the institution.”<sup>27</sup> Advertising the insured status of the depository institution serves the FDIC’s primary policy goal, instilling confidence in the financial system.<sup>28</sup>

#### A. *False Advertising and Misrepresentation*

If a financial institution falsely advertises or misrepresents its insured status, the FDIC may bring an enforcement action against the institution under Section 18(a)(4) of the Federal Deposit Insurance Act.<sup>29</sup> Specifically, this section prohibits financial institutions from falsely implying or representing that the FDIC insures them by using the official sign or the term “Federal Deposit,” “Federal Deposit Insurance,” or “Federal Deposit Insurance Corporation” in any part of the business name or advertising.<sup>30</sup> Additionally, the institution may not “knowingly” misrepresent that a deposit is insured or the extent or manner to which an obligation is insured.<sup>31</sup>

In addition to this statute, the FDIC issued a regulation that details prohibitive behavior for financial institutions using the FDIC name or logo and making representations about their insurance

<sup>24</sup> *Id.*; FED. DEPOSIT INS. CORP., APPLYING FOR DEPOSIT INSURANCE: A HANDBOOK FOR ORGANIZERS OF DE NOVO INSTITUTIONS, DIVISION OF RISK MANAGEMENT SUPERVISION 23 (2017) <https://www.fdic.gov/regulations/applications/handbook.pdf> [hereinafter “FDIC HANDBOOK”].

<sup>25</sup> See FDIC HANDBOOK, *supra* note 26, at 23 (detailing exactly how each factor can be resolved in favor of insuring a bank).

<sup>26</sup> Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 12 C.F.R. § 328.2(a)(3) (2022).

<sup>27</sup> *Id.* § 328.2(b)(1), (c)(1).

<sup>28</sup> See *About, FDIC*, <https://www.fdic.gov/about/> (last visited Mar. 8, 2023) (“The Federal Deposit Insurance Corporation (FDIC) is an independent agency created by the Congress to maintain stability and public confidence in the nation’s financial system.”).

<sup>29</sup> Federal Deposit Insurance Act § 2[18], 12 U.S.C. § 1828(a)(4)(C)-(E).

<sup>30</sup> *Id.* § 1828(a)(4)(B).

<sup>31</sup> *Id.* § 1828(a)(4)(C).

status.<sup>32</sup> The regulation extends to any person who (1) “[f]alsely represents, expressly or by implication, that any deposit liability, obligation, certificate, or share is FDIC-insured by using the FDIC’s name or logo;” (2) “[k]nowingly misrepresents, expressly or by implication, that any deposit liability, obligation, certificate, or share is insured by the FDIC if such an item is not so insured;” (3) [k]nowingly misrepresents, expressly or by implication, the extent to which or the manner in which any deposit liability, obligation, certificate, or share is insured by the FDIC, if such an item is not insured to the extent or manner represented;” or (4) “aids and abets” anyone covered in the above three sections.<sup>33</sup> Significantly, the regulation explains that an omission by a financial institution that may lead a reasonable consumer to believe a misrepresentation can also result in liability.<sup>34</sup> This includes omitting the identity of any insured depository institution with which the FinTech directly or indirectly has a business relationship or omitting the limit to which deposits are insured.<sup>35</sup> The representation made by an institution must also be material, generally meaning that it either states that certain non-insurable products are insured, that the institution is insured when it is not, or that the amount of insurance is different from what is actually provided.<sup>36</sup>

Notably, the statute and the regulation specifically focus on using the FDIC name and official sign to falsely represent or imply insurance status, and knowingly misrepresenting its insurance status or the extent of its insurance.<sup>37</sup> These two prohibitions will be the primary focus of an improved regulatory scheme based on trademark law.

#### *B. Problems Arising from FinTechs*

Before its bankruptcy in November of 2022, the cryptocurrency exchange FTX US (“FTX”) was sent a cease-and-desist letter from the FDIC claiming that it had made false and misleading statements in

<sup>32</sup> See generally Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 12 C.F.R. § 328.100 (2022).

<sup>33</sup> *Id.* § 328.100.

<sup>34</sup> *Id.* § 328.102(b)(5)(A)-(D).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* § 328.102(b)(4)(i)-(iv).

<sup>37</sup> Federal Deposit Insurance Act § 2[18], 12 U.S.C. § 1828(a)(4)(B); 12 C.F.R. § 328.100.

violation of Section 18(a)(4) of the Federal Deposit Insurance Act.<sup>38</sup> Specifically, Brett Harrison of FTX represented on Twitter that “direct deposits from employers to FTX are stored in individual FDIC-insured bank accounts in the users’ names and that “stocks are held in FDIC-insured and SIPC-insured brokerage accounts.”<sup>39</sup> The FDIC responded to these representations, stating that they “contain false and misleading representations that uninsured products are insured by the FDIC,” in addition to misrepresentations about the extent and manner of the insurance provided.<sup>40</sup> They also claim that Harrison had falsely implied that FTX was itself FDIC-insured, the brokerage accounts of FTX are insured, and that cryptocurrency can be FDIC insured.<sup>41</sup> Each of these implications were false.<sup>42</sup> Further, FTX failed to identify the banks that FTX had relationships with, directly or indirectly, for which consumer funds are deposited.<sup>43</sup>

Consequently, the FDIC demanded corrective action from FTX, including the following.<sup>44</sup> FTX shall remove all statements that explicitly or implicitly suggest that FTX is FDIC-insured, FTX brokerage accounts are FDIC-insured, any funds held as cryptocurrency are protected by FDIC insurance, and that FDIC insurance provides coverage in any manner and extent “other than those set forth in the Federal Deposit Insurance Act.”<sup>45</sup> This includes scrubbing these statements from any website, including accounts on Twitter or other social media platforms, and any marketing or consumer-facing materials.<sup>46</sup> FTX must then submit written confirmation that all statements have been removed within 15 days.<sup>47</sup>

After the FDIC issued the cease-and-desist, Harrison and FTX founder Sam Bankman-Fried responded to the document through Twitter.<sup>48</sup> Bankman-Fried tweeted that “FTX does not have FDIC

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<sup>38</sup> Letter from Seth P. Rosebrock, Assistant Gen. Couns., Enf’t, Fed. Deposit Ins. Corp., to Brett Harrison, President, and Dan Friedberg, Chief Regul. Officer, FTX (Aug. 18, 2022) (on file with the FDIC) [hereinafter “FTX Letter”].

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See Kevin Helms, *FDIC Issues Crypto-Related Cease and Desist Orders to 5 Companies Including FTX US Exchange, BITCOIN.COM* (AUG. 20, 2022), <https://news.bitcoin.com/fdic-issues-crypto-related-cease-and-desist-orders-to-5-companies-including-ftx-us-exchange/> (“Bankman-Fried apologized for the confusion regarding FDIC insurance on Twitter. ‘Clear communication is really important; sorry!’ he tweeted. ‘FTX does not have FDIC insurance (and we’ve never said so on website etc.); banks we work with do.’”).

insurance (and we've never said so on website etc.); *banks we work with do*.<sup>49</sup> In a way, Bankman-Fried responded to the cease-and-desist letter about misrepresenting statements with a statement that may still confuse depositors regarding the insured status of their accounts.<sup>50</sup>

Numerous other FinTechs have recently been the subject of FDIC false advertising and misrepresentation claims.<sup>51</sup> Gemini, a cryptocurrency exchange, misrepresented insurance status to customers who operate a Gemini “Earn” account, stating that funds would be protected in the case of a Gemini collapse.<sup>52</sup> Additionally, CEX.IO, another cryptocurrency exchange, was sent a cease and desist from the FDIC because of misrepresentations about the insured status of its fiat currency accounts.<sup>53</sup> This demonstrates the FDIC’s commitment to protecting depositors, maintaining its well-respected name, and preventing an increasing number of infringers from misleading consumers.<sup>54</sup>

### III. TRADEMARK-BASED ENFORCEMENT SCHEME

#### A. Trademark Law Background

In 1946, the Lanham Act was enacted to provide a statutory process of federally protecting a person’s or other entities’ trademarks.<sup>55</sup> Generally, a trademark is “any word, name, symbol, or device, or any combination thereof” used to identify and distinguish the goods of one person from those

<sup>49</sup> *Id.*

<sup>50</sup> See *id.* (suggesting that FTX’s statements may be confusing to customers, and explaining how FTX apologized for causing any confusion through its advertising).

<sup>51</sup> Press Release, Fed. Deposit Ins. Corp., FDIC Issues Cease and Desist Letters to Five Companies For Making Crypto-Related False or Misleading Representations about Deposit Insurance (Aug. 19, 2022).

<sup>52</sup> Steve Kaaru, *Gemini Lied About FDIC Insurance in Emails to Earn Customers: Report*, COINGEEK (Feb. 3, 2023), <https://coingeek.com/gemini-lied-about-fdic-insurance-in-emails-to-earn-customers-report/>.

<sup>53</sup> Nelson Wang, *FDIC Tells Crypto Exchange CEX.IO to Stop Claiming US Dollars Held in Its Wallets Are Insured*, COINDESK (Feb. 15, 2023), <https://www.coindesk.com/policy/2023/02/15/fdic-tells-crypto-exchange-cexio-to-stop-claiming-us-dollars-held-in-its-wallets-are-insured/>.

<sup>54</sup> See Susan Seaman & Daniel Wilkinson, *Why Fintechs and Crypto Companies Should Pay Attention to the FDIC’s Latest Round of Cease-and-Desist Letters*, HUSCH BLACKWELL (Feb. 22, 2023), <https://www.huschblackwell.com/newsandinsights/why-fintechs-and-crypto-companies-should-pay-attention-to-the-fdics-latest-round-of-cease-and-desist-letters> (“The FDIC’s latest round of cease-and-desist letters follows another batch sent in August 2022 to five crypto-related companies including the now infamous FTX. At the time of the initial cease-and-desist letters, the FDIC had warned of an increase in deposit insurance misrepresentations that jeopardized the integrity of the FDIC insurance system and create consumer harm.”).

<sup>55</sup> See *Lanham Act: Everything You Need to Know*, UPCOUNSEL TECH., <https://www.upcounsel.com/lanham-act> (last visited Mar. 25, 2023) (“The Lanham Act created a national trademark registration system. Enacted in 1946, this act also protects a trademark owner against others using similar marks.”).

manufactured by others.<sup>56</sup> Notably, trademarks protect a company's brand, provide consumers with a method of identifying a product, and protect against counterfeiting and fraud.<sup>57</sup> Like the FDIC, an important policy rationale supporting trademark protection is giving customers confidence in the products they consume and keeping other companies from trading off the goodwill that an entity has garnered through its business.<sup>58</sup>

To protect a trademark, the mark must be “used in commerce” and “sufficiently distinctive.”<sup>59</sup> The use in commerce requirement demands that the trademark applicant have a bona fide intent to use the mark in commerce, meaning all commerce that Congress may lawfully regulate.<sup>60</sup> For service providers, like the FDIC, a trademark satisfies this element when (1) the mark is “used or displayed in the sale or advertising of services” and (2) the services are “rendered in commerce” or “rendered in more than one State.”<sup>61</sup> The distinctiveness requirement is prominently governed by the four-category system stemming from the decision *Abercrombie & Fitch Co. v. Hunting World, Inc.*, each resulting in a different level of protection for the mark.<sup>62</sup>

The four categories include marks that are generic, descriptive, suggestive, and arbitrary or fanciful.<sup>63</sup> A generic mark is a mark that automatically indicates the product that is provided by the company and may never qualify for trademark protection.<sup>64</sup> An example of a generic mark would be a bagel shop called “Bagels.”<sup>65</sup> A descriptive mark describes the aspect of the goods without identifying the source

<sup>56</sup> Lanham Act § 45, 15 U.S.C. § 112.

<sup>57</sup> *What is a trademark?*, U.S. PAT. AND TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/what-trademark> (last visited Mar. 25, 2023).

<sup>58</sup> See *id.* (explaining the several reasons why trademark law protects both the business and the consumers).

<sup>59</sup> 15 U.S.C. § 1052(f) (“Except as expressly excluded in subsections (a), (b), (c), (d), (e)(3), and (e)(5) of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant’s goods in commerce.”).

<sup>60</sup> *Id.* § 1127.

<sup>61</sup> *Aycock Engineering, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 1357 (Fed. Cir. 2009).

<sup>62</sup> See *Abercrombie & Fitch Co. v. Hunting World*, 537 F.2d 4, 9 (2d Cir. 1976) (explaining each category of trademark protection and the protection provided by each).

<sup>63</sup> *Id.*

<sup>64</sup> See *id.* (“A generic term is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species. At common law neither those terms which were generic nor those which were merely descriptive could become valid trademarks, . . .”).

<sup>65</sup> See *Generic Trademark: Everything You Need to Know*, UPCOUNSEL TECH., <https://www.upcounsel.com/lanham-act> (last visited Mar. 25, 2023) (“Generic trademarks are common terms used to name products or services, for example, a brand of shoes called ‘shoes.’”).

from which the goods come.<sup>66</sup> A descriptive trademark does not qualify for protection without “secondary meaning,” also known as “acquired distinctiveness.”<sup>67</sup> A descriptive mark may acquire distinctiveness if it has either become distinctive as to the source of the product or if the mark has been used consistently and exclusively for five years before registration.<sup>68</sup> An example of a descriptive mark would be an ice cream shop called “cold and creamy.”<sup>69</sup> A suggestive mark is a mark that suggests the qualities of the product and requires consumers to put some thought into what product the company provides.<sup>70</sup> An example of a suggestive mark is Microsoft, suggesting a type of software company.<sup>71</sup> An arbitrary mark is a mark that is the name of one product being used to sell another unrelated product, like Apple for computers.<sup>72</sup> And a fanciful mark is a mark that is a made-up name for a product, like Xerox for

<sup>66</sup> *Strong Trademarks*, U.S. PAT. AND TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/strong-trademarks#:~:text=Descriptive%20trademarks%20merely%20describe%20some,in%20commerce%20over%20many%20years> (last visited Mar. 25, 2023).

<sup>67</sup> See *Sorensen v. WD-40 Co.*, 792 F.3d 712, 723 (7th Cir. 2015) (“Descriptive terms, after all, are protectable as a trademark if they have developed secondary meaning.”).

<sup>68</sup> See Lanham Act § 2(f), 15 U.S.C. § 1052(f) (“Except as expressly excluded in subsections (a), (b), (c), (d), (e)(3), and (e)(5) of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant’s goods in commerce.”); see *id.* (“The Director may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant’s goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.”).

<sup>69</sup> See *Descriptive Trademark: Everything You Need to Know*, UPCOUNSEL TECH., <https://www.upcounsel.com/lanham-act> (last visited Mar. 25, 2023) (“A descriptive trademark identifies one or more characteristics of a product or service covered by the mark and only serves to describe the product.”).

<sup>70</sup> *Suggestive Trademark: Everything You Need to Know*, UPCOUNSEL TECH., <https://www.upcounsel.com/lanham-act> (last visited Mar. 25, 2023).

<sup>71</sup> *Id.*

<sup>72</sup> See *Arbitrary Trademark: Everything You Need to Know*, UPCOUNSEL TECH., <https://www.upcounsel.com/lanham-act> (last visited Mar. 25, 2023) (“An arbitrary trademark is a word or image that already exists, but it has nothing to do with the business that uses it. Apple Computers is one of the classic examples, since iPhones and laptops have nothing to do with fruit or cider. Shell gas stations and Camel cigarettes are other good examples.”).



printers.<sup>73</sup> The suggestive, arbitrary, and fanciful marks are all entitled to trademark protection without having to prove they have acquired distinctiveness.<sup>74</sup>

The Lanham Act allows for numerous causes of action in the case of a violation,<sup>75</sup> but the two claims that will be addressed here are trademark infringement and dilution.

The trademark infringement claim includes using a mark that is either the same or similar to another individual's mark.<sup>76</sup> The standard for infringement is called the "confusingly similar" standard, which relies on the mark causing confusion, mistake, or deception in the eyes of the consumer.<sup>77</sup> Seven factors are called upon to determine if a mark is confusingly similar to another, which are enumerated in the *Polaroid v. Polarad* case.<sup>78</sup> These factors include (1) the strength of the plaintiff's trademark, (2) the degree of similarity between the two marks at issue, (3) the similarity of the goods and services at issue, (4) evidence of actual confusion, (5) purchaser sophistication, (6) the quality of the defendant's goods or services, and (7) the defendant's intent in adopting the mark.<sup>79</sup> Different circuits consider different factors, but there is much overlap between the circuits, and numerous *Polaroid* factors remain a popular choice among many circuit tests.<sup>80</sup>

In addition to the trademark infringement claim, the trademark dilution claim is a cause of action based on an "association arising from the similarity between a mark or trade name and a famous mark"

<sup>73</sup> See *Fanciful Trademark: Everything You Need to Know*, UPCOUNSEL TECH., <https://www.upcounsel.com/lanham-act> (last visited Mar. 25, 2023) ("Fanciful trademarks are made-up terms invented for the single purpose of functioning as a trademark.").

<sup>74</sup> *Abercrombie & Fitch Co. v. Hunting World*, 537 F.2d 4, 17 (2d Cir. 1976) ("If a term is suggestive, it is entitled to registration without proof of secondary meaning. . . . It need hardly be added that fanciful or arbitrary terms enjoy all the rights accorded to suggestive terms as marks - without the need of debating whether the term is "merely descriptive" and with ease of establishing infringement.").

<sup>75</sup> See Lanham Act § 32(1)(a), 15 U.S.C. § 1114(1)(a) (listing the basis for the trademark infringement claim); *id.* § 1125(c) (listing the basis for the trademark dilution claim).

<sup>76</sup> 15 U.S.C. § 1114(1)(a), (b).

<sup>77</sup> *Id.*

<sup>78</sup> *Polaroid Corp. v. Polarad Elects.*, 287 F.2d 492, 495 (2d Cir. 1961).

<sup>79</sup> See *id.* ("Where the products are different, a prior owner's chance of success in a trademark infringement action is a function of many variables: the strength of his mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers.").

<sup>80</sup> Although the FDIC could bring an action in different jurisdictions with different tests, each jurisdiction recognizes numerous factors that are either similar or identical to the *Polaroid* factors. Because of this, *Polaroid* has been a key case involving the standard for trademark infringement, and for purposes of this article, we will therefore rely on the polaroid factors for the confusingly similar analysis. Trademark Litigation: Likelihood of Confusion Tests by Circuit Chart, Practical Law Checklist 2-519-7062.

that impairs the distinctiveness or harms the reputation of a mark.<sup>81</sup> There are two species of trademark dilution.<sup>82</sup> “Dilution by blurring” prevents another mark from impairing the distinctiveness of a famous mark.<sup>83</sup> And “dilution by tarnishment” prevents another mark from harming the reputation of a famous mark.<sup>84</sup> Several factors are listed for consideration of a dilution by blurring claim, including (1) “[t]he degree of similarity between the mark or trade name and the famous mark,” (2) “[t]he degree of inherent or acquired distinctiveness of the famous mark,” (3) “[t]he extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark,” (4) “[t]he degree of recognition of the famous mark,” (5) “[w]hether the user of the mark or trade name intended to create an association with the famous mark,” and (6) “any actual association between the mark or trade name and the famous mark.”<sup>85</sup> For dilution by tarnishment, what constitutes harm to a mark varies between jurisdictions, but generally includes an association that imposes different values onto a mark that the original trademark holder did not intend.<sup>86</sup>

Overall, trademark dilution protects famous marks from losing the value they hold in consumers’ minds by preventing other marks from impairing their distinctiveness and harming their reputation.<sup>87</sup>

#### *B. Comparison of the FDIC False Advertising and Misrepresentation Statute to the Lanham Act*

Several significant differences exist between the FDIC False Advertising and Misrepresentation statute and the Lanham Act. Many of these differences suggest that if the FDIC could enforce its name and logo as trademarks, it would expand the scope of enforcement against those making misrepresentations regarding its FDIC-insured status.

<sup>81</sup> In order to qualify for a trademark dilution claim, the mark must be “famous.” 15 U.S.C. § 1125(b)(2). This is evaluated using the fame factors, including, (i) the duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties, (ii) the amount, volume, and geographic extent of sales of goods or services offered under the mark, (iii) the extent of actual recognition of the mark, and (iv) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register. *Id.*

<sup>82</sup> 15 U.S.C. § 1125(c)(2)(B), (C)

<sup>83</sup> *Id.* § 1125(c)(2)(B),

<sup>84</sup> *Id.* § 1125(c)(2)(C).

<sup>85</sup> *Id.* § 1125(c)(2)(B).

<sup>86</sup> For example, there are several jurisdictions that say that the reputation of a mark may be harmed by the association created by a similar mark that is used to sell sex related products. *V Secret Catalogue, Inc. v. Moseley*, 605 F.3d 382, 388 (6th Cir. 2010).

<sup>87</sup> 15 U.S.C. § 1125(c)(2)(B), (C).

### 1. Broader Standard for Bringing a Claim

Under the current FDIC statute, several requirements must be proved to bring a successful claim against a possible infringer.<sup>88</sup> For Section 328.102(a) of the regulation, this requirement is the “explicit or implied” representation of coverage when that coverage does not exist, specifically regarding the use of the FDIC logo and name.<sup>89</sup> For example, this would mean that to bring a successful claim, the FDIC would have to prove that using its name or logo would mislead the consumer to believe that its deposit was covered when it was not.<sup>90</sup>

In comparison, a trademark infringement claim would require that the FDIC name or logo was used and that the mark is “confusingly similar.”<sup>91</sup> The confusingly similar standard would result in a much broader ability to control the use of the name or logo of the FDIC. When applying the *Polaroid* factors to the confusion analysis, the first two factors, (1) the strength of the plaintiff’s trademark and (2) the degree of similarity between the two marks at issue, weigh overwhelmingly in favor of trademark infringement.<sup>92</sup> The FDIC has been a prominent participant in the US banking system for 90 years, indicating immense amounts of secondary meaning and thus a stronger mark.<sup>93</sup> Further, since the FDIC has been an exclusive user of its mark for more than five years, the statutory presumption for acquired distinctiveness would also be satisfied.<sup>94</sup> Additionally, the mark is entirely identical, showing the highest degree of similarity possible.<sup>95</sup> This is commonly referred to as “direct infringement,” where the use of

<sup>88</sup> Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 12 C.F.R. § 328.100 (2022).

<sup>89</sup> *Id.* § 328.102(a).

<sup>90</sup> *See id.*

<sup>91</sup> 15 U.S.C. § 1114(1)(a).

<sup>92</sup> *See Polaroid Corp. v. Polarad Elects.*, 287 F.2d 492, 495 (2nd Cir. 1961) (explaining how a similarity between the marks lends towards a finding of trademark infringement based on the confusingly similar standard).

<sup>93</sup> *See* FED. DEPOSIT INS. CORP., *THE FIRST FIFTY YEARS: A HISTORY OF THE FDIC 1933–1983*, at 3 (1984) (“Established by the Banking Act of 1933 at the depth of the most severe banking crisis in the nation’s history, its immediate contribution was the restoration of public confidence in banks.”).

<sup>94</sup> *See* 15 U.S.C. § 1052(f) (“The Director may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant’s goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.”).

<sup>95</sup> *See Polaroid*, 287 F.2d 492, 495 (2nd Cir. 1961) (explaining how a similarity between the marks lends towards a finding of trademark infringement based on the confusingly similar standard).

identical marks causes the confusion.<sup>96</sup> Therefore, finding infringement of the FDIC marks would be much easier to prove than a claim under the FDIC statute.<sup>97</sup> In addition, factor four of the *Polaroid* test is very similar to the requirement under the current FDIC statute, that being evidence of actual confusion.<sup>98</sup> This means that even without evidence of actual confusion, a trademark infringement claim could still succeed, but the current FDIC statute would be entirely stifled.<sup>99</sup>

For Section 328.102(b) of the regulation, the requirement for a successful claim is that there is a “false or misleading” representation regarding the deposit insurance.<sup>100</sup> This would result in the same argument as above, where confusion would be a much easier standard to apply because of *Polaroid* factors one and two.<sup>101</sup> Further, the lack of any misrepresentation would stifle a claim under the FDIC statute where a trademark infringement claim could still succeed.<sup>102</sup>

In addition to trademark infringement, the trademark dilution claim would also be a broader claim than the current FDIC statute. The first four factors for considering a dilution by blurring claim would all weigh heavily in favor of the FDIC.<sup>103</sup> The use of the marks would be identical, and the secondary meaning of the FDIC name would be prominent.<sup>104</sup> Further, the FDIC has been the only entity to use the marks for 90 years, and the mark is a staple within commercial banks today.<sup>105</sup> This would give a dilution by blurring claim a high likelihood for success.<sup>106</sup>

<sup>96</sup> *Direct Infringement*, CORNELL LAW SCHOOL: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/direct\\_infringement#:~:text=In%20trademark%20law%2C%20direct%20infringement,cause%20mistake%2C%20or%20to%20deceive](https://www.law.cornell.edu/wex/direct_infringement#:~:text=In%20trademark%20law%2C%20direct%20infringement,cause%20mistake%2C%20or%20to%20deceive) (last visited Mar. 25, 2023).

<sup>97</sup> *Id.*

<sup>98</sup> *Compare Polaroid*, 287 F.2d 492, 495 (2d Cir. 1961), with *Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo*, 12 C.F.R. § 328.100 (2022).

<sup>99</sup> *See Polaroid*, 287 F.2d 492, 495 (2d Cir. 1961) (explaining that not all factors for confusion are required to succeed on a trademark infringement claim).

<sup>100</sup> 12 C.F.R. § 328.102(b).

<sup>101</sup> *Compare Polaroid*, 287 F.2d 492, 495 (2d Cir. 1961), with 12 C.F.R. § 328.102(a).

<sup>102</sup> *Compare Polaroid*, 287 F.2d 492, 495 (2d Cir. 1961), with 12 C.F.R. § 328.102(a).

<sup>103</sup> *See Lanham Act* § 43(c)(2)(B), 15 U.S.C. § 1125(c)(2)(B) (listing the factors for considering a trademark dilution claim).

<sup>104</sup> *Id.*

<sup>105</sup> *See id.* (reasoning that because the marks are identical and the FDIC brand is strong, that the factors listed in the statute would weigh heavily in favor of finding a claim for trademark dilution).

<sup>106</sup> *Id.*

Overall, trademark law would make these claims much more likely to succeed, and the FDIC would also have more discretion over the moderation of the use of its trademarks.<sup>107</sup> This would also mean the FDIC could sooner stop the harm caused by consumer confusion.<sup>108</sup>

## 2. Scierter Requirement

A notable feature of Section 328.102(b) of the FDIC regulation is the scierter requirement for bringing a claim against an infringer.<sup>109</sup> To “knowingly” make false or misleading representations about deposit insurance substantially raises the bar for proving this claim because the FDIC would be required to argue that, in the infringer’s mind, they knew they were misleading consumers with its representations.<sup>110</sup>

Under the Lanham Act and the *Polaroid* factors, however, there is no requirement of knowledge or any other scierter of the infringer.<sup>111</sup> This would make a claim much easier to prove because there is no guesswork regarding what the infringer really meant when making representations.<sup>112</sup> However, a factor of the *Polaroid* test does include “the defendant’s intent in adopting the mark,”<sup>113</sup> and a factor for dilution by blurring is “whether the user of the mark or trade name intended to create an association with the famous mark.”<sup>114</sup> This means that being able to prove bad intent on the part of the infringer would

<sup>107</sup> See *Polaroid*, 287 F.2d 492, 495 (2nd Cir. 1961) (reasoning that the wide variety of factors provide a wide array of arguments that can be made against possible infringers and that more than just these factors may be considered in the analysis).

<sup>108</sup> *Id.*

<sup>109</sup> Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo, 12 C.F.R. § 328.102(b) (2022).

<sup>110</sup> *Id.*; see also Toby Gilbert, *Regulators Have a Weak Case Against FTX on Deposit Insurance*, COINTELEGRAPH (Aug. 26, 2022), <https://cointelegraph.com/news/regulators-have-a-weak-case-against-ftx> (explaining how the “knowing” requirement would be difficult to establish given the specific facts of FTX’s representation about FDIC insurance).

<sup>111</sup> Compare Lanham Act § 43(c)(2), 15 U.S.C. § 1125(c)(2), and *id.* § 1114, with *Polaroid*, 287 F.2d 492 (2nd Cir. 1961) (demonstrating the absence of any scierter requirement that is necessary to bring a trademark claim).

<sup>112</sup> See *Mens Rea*, CORNELL LAW SCHOOL: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/mens\\_rea](https://www.law.cornell.edu/wex/mens_rea) (last visited Apr. 21, 2023) (explaining the different mental states required to prove different types of claims and how they get progressively harder to prove the closer you get to intent).

<sup>113</sup> *Polaroid Corp. v. Polarad Elects.*, 287 F.2d 492 (2d Cir. 1961).

<sup>114</sup> 15 U.S.C. § 1125(c)(2).

increase the likelihood of success on a trademark claim.<sup>115</sup> But it would by no means prohibit the success of these claims as it would under the FDIC statute.<sup>116</sup>

### 3. Expansive Case Law

Another important distinction between the FDIC statute and the Lanham Act is that the case law surrounding the Lanham Act dwarfs that surrounding the FDIC statute.<sup>117</sup> Because trademark laws have taken many shapes and forms until its culmination in the Lanham Act, trademark disputes have been at issue for a significant period of time.<sup>118</sup> This means that if the FDIC wanted to bring a claim against a possible infringer, they could rely on a significantly larger amount of cases than if they were litigating solely with the FDIC statute and regulations.<sup>119</sup>

This also means that if infringers were to get creative with how they may use the FDIC name and logo, the vast amount of trademark case law would help the FDIC craft an innovative solution to the infringement.<sup>120</sup> For example, if an infringer were to carefully suggest that it was an FDIC-insured institution without using the exact FDIC name and logo, the confusingly similar standard may still be used to file a claim against them by speaking specifically to the caselaw of the jurisdiction.<sup>121</sup>

<sup>115</sup> Compare *Polaroid*, 287 F.2d 492, 495 (2d Cir. 1961), and 15 U.S.C. § 1125(c)(2), with Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, 12 C.F.R. § 328.102(b) (2022) (demonstrating how the lack of a knowledge requirement could completely defeat a claim under the FDIC statute, but would not defeat a trademark claim).

<sup>116</sup> Compare *Polaroid*, 287 F.2d 492, 495 (2d Cir. 1961), and 15 U.S.C. § 1125(c)(2), with 12 C.F.R. § 328.102(b) (2022) (demonstrating how the lack of a knowledge requirement could completely defeat a claim under the FDIC statute, but would not defeat a trademark claim).

<sup>117</sup> See *Key Cases and Definitions in Intellectual Property Law*, WASH. UNIV. SCH. OF L. (Jun. 10, 2021), <https://onlinelaw.wustl.edu/blog/key-cases-definitions-in-intellectual-property-law/> (explaining the vast history of trademark law in the United States and the large amount of significant caselaw surrounding trademark law).

<sup>118</sup> *Id.*

<sup>119</sup> See *id.* (reasoning that the large amount of caselaw surrounding the Lanham Act would provide the FDIC with the tools necessary to stop infringers from confusing consumers).

<sup>120</sup> It is very common in trademark law for someone to attempt to evoke another brand by trying to emulate their trademarks without copying them identically. In particular, parody in trademark law has been a hot topic as of recent, and presents much case law that could be relevant if a FinTech were to evoke the idea that they may be FDIC insured without directly copying their name or logo. See generally *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC.*, 507 F.3d 252 (4th Cir. 2007) (explaining how one company may have a valid claim against another for creating a dog toy that replicates another's product without using the exact words and colors, but rather brings the ideas of the other product to mind through the dog toy).

<sup>121</sup> Compare *Polaroid Corp. v. Polarad Elects.*, 287 F.2d 492, 495 (2d Cir. 1961), with 12 C.F.R. § 328.102(a).

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## Specialized Work Experience

## Professional Organization

Organizations	Just the Beginning Organization
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## Recommenders

Gocke, Alison  
 agocke@uchicago.edu  
 Strahilevitz, Lior  
 lior@uchicago.edu  
 773-834-8665

Masur, Jonathan  
 jmasur@uchicago.edu  
 773-702-5188

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**



## Tanvi Antoo

5454 S. Shore Dr., Apt 1010, Chicago, IL 60615 | (925) 998-8473 | tanviantoo@uchicago.edu

June 26, 2023

The Honorable Jamar K. Walker  
U.S. District Court for the Eastern District of Virginia  
600 Granby Street  
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year law student at The University of Chicago Law School, and I am applying for a clerkship in your chambers for the 2024 term. I am especially drawn to the Eastern District of Virginia for its patent-heavy caseload, as patent law is a special interest area of mine. However, I also hope to gain familiarity with a range of legal issues and understand the procedural complexities of litigation that unfolds in district courts. The prospect of starting my legal career as a clerk in your chambers and being able to experience living in Virginia is truly exciting to me. I also feel that being one among your early clerks would be an invaluable opportunity and appreciate your consideration.

As a research assistant to Professors Jonathan Masur and Alison Gocke, I developed the practice of delving into unfamiliar areas of the law, from energy law to patents to questions of foreign law focused on India. I have further honed my skills through my role as a Comments Editor on *The University of Chicago Law Review*. The process of editing my peers' work has not only elevated my abilities as a writer, editor, and critical thinker but has also enhanced my efficiency and attention to detail. Additionally, I have spent the last year developing my own Comment, which analyzes the disagreement among district courts over the interpretation of the America Invents Act's *inter partes* review estoppel provision. This has allowed me to grapple with difficult questions of statutory interpretation, the workings of patent law, and explore the division of labor between district courts and administrative bodies.

At Chicago-based litigation boutique Goldman Ismail, I developed a true passion for the practice of law and gained hands-on experience by drafting pleadings, conducting legal research and analysis, and actively participating in meetings. I was particularly excited to attend trial preparation for a patent infringement matter, where I contributed to expert witness preparation, conducted legal research for emergency motions, and observed firsthand what goes into trial preparation. As a summer associate at Gibson, Dunn & Crutcher, I am continuing to build a familiarity with the law, legal research, and writing. By working as a clerk in your chambers, I hope to contribute to the resolution of difficult cases and work diligently to expand my overall understanding of complex litigation. I am confident that my strong research and analytical skills, combined with my passion for legal analysis, will allow me to make meaningful contributions to your chambers while further developing my own expertise.

A resume, transcripts, and writing sample are enclosed. Letters of recommendation from Professors Jonathan Masur, Lior Strahilevitz, and Alison Gocke will arrive under separate cover. If there is additional information I can provide, please do not hesitate to let me know.

Sincerely,



Tanvi Antoo

# Tanvi Antoo

5454 S. Shore Dr., Apt. 1010, Chicago, IL 60615 | (925) 998-8473 | tanviantoo@uchicago.edu

## EDUCATION

### The University of Chicago Law School

Chicago, Illinois

Juris Doctor expected June 2024

- *Journal: The University of Chicago Law Review*, Comments Editor
- *Publications: Undefined "Ground": Form or Substance in PTO Estoppel*, 90 U. Chi. L. Rev. (forthcoming 2023-24)
- *Activities*: Hinton Moot Court; American Constitution Society, Secretary; South Asian Law Students Assoc., Treasurer

### Santa Clara University

Santa Clara, California

Bachelor of Science in Political Science and Philosophy, *magna cum laude*

December 2020

- *Honors*: Sourisseau Award (outstanding Philosophy senior); Fallon Award (outstanding Philosophy junior)

## PROFESSIONAL EXPERIENCE

### Gibson, Dunn & Crutcher LLP

New York, New York & San Francisco, California

Summer Associate

Present

### Goldman Ismail Tomaselli Brennan & Baum LLP

Chicago, Illinois

Summer Associate

July 2022 and August 2023

- Conducted legal research on discovery obligations and on substitute inventor oaths in patent applications
- Assisted in drafting portions of a motion to dismiss and conducted legal research on relevant Missouri law
- Researched expert witnesses to assist in preparation for depositions on causation in mass tort suit
- Attended trials on patent infringement and product liability claims and assisted with trial preparation

### The University of Chicago Law School

Chicago, Illinois

Research Assistant to Professor Jonathan Masur

Present

- Researched the doctrine of public use within patent law and prepared a summary of relevant case law
- Researched marriage laws and norms in mid-20<sup>th</sup> century India and wrote a summary of laws and secondary sources

### Illinois Juvenile Defender Resource Center | Office of the State Appellate Defender

Chicago, Illinois

Legal Intern

June 2022 – September 2022

- Performed legal research and writing for a project to create an updated handbook for juvenile defenders

### The University of Chicago Law School

Chicago, Illinois

Research Assistant to Bigelow Fellow Alison Goeke

June 2022 – July 2022

- Researched energy law scholar Shelley Welton's work on energy law's equity concerns and democratization problem
- Wrote literature review on the justice and equity issues associated with clean electrification and the green transition

### The LSAT Nerds

Chicago, Illinois

Hiring Coordinator and Tutor

April 2021 – September 2021

- Scheduled interviews and training sessions for prospective hires, managed onboarding, and provided private tutoring

### Indu Law Group

San Jose, California

Intern

January 2020 – April 2020

- Started PERM and I-140 applications for the 2020 cycle and created corresponding recruitment files
- Created a new system of comprehensive job duties and titles for a client company for ease of filing applications

### Santa Clara County Public Defender Office

San Jose, California

Fall Quarter Intern

October 2019 – December 2019

- Assisted with motion drafting, summarized transcripts, evidence, records, and created exhibits to assist defense

### Office of Congressman Ro Khanna

Santa Clara, California

Fall Quarter Congressional Intern

October 2018 – December 2018

- Completed comprehensive constituent casework using USCIS Case Status, Visa Bulletin, and Processing Times

## HOBBIES AND INTERESTS

Writing short fiction, Bharatanatyam (Indian classical dance form), experimenting with new coffee brewing methods, vegetarian cooking, consciousness research, Indian philosophy, and Buddhist philosophy





Name: Tanvi Antoo  
Student ID: 12335012

University of Chicago Law School

Academic Program History

Program: Law School  
Start Quarter: Autumn 2021  
Current Status: Active in Program  
J.D. in Law

External Education

Santa Clara University  
Santa Clara, California  
Bachelor of Science 2020

Beginning of Law School Record

Autumn 2021			Attempted	Earned	Grade
Course	Description				
LAWS 30101	Elements of the Law Lior Strahilevitz		3	3	182
LAWS 30211	Civil Procedure Emily Buss		4	4	177
LAWS 30611	Torts Adam Chilton		4	4	176
LAWS 30711	Legal Research and Writing Alison Gocke		1	1	178

Winter 2022			Attempted	Earned	Grade
Course	Description				
LAWS 30311	Criminal Law Jonathan Masur		4	4	177
LAWS 30411	Property Aziz Huq		4	4	177
LAWS 30511	Contracts Douglas Baird		4	4	176
LAWS 30711	Legal Research and Writing Alison Gocke		1	1	178

Spring 2022			Attempted	Earned	Grade
Course	Description				
LAWS 30712	Legal Research, Writing, and Advocacy Alison Gocke		2	2	178
LAWS 30713	Transactional Lawyering Joan Neal		3	3	177
LAWS 40101	Constitutional Law I: Governmental Structure Bridget Fahey		3	3	177
LAWS 44201	Legislation and Statutory Interpretation Ryan Doerfler		3	3	179
LAWS 47411	Jurisprudence I: Theories of Law and Adjudication Brian Leiter		3	3	177

Summer 2022

Honors/Awards  
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course	Description	Attempted	Earned	Grade
LAWS 41601	Evidence Geoffrey Stone	3	3	178
LAWS 42301	Business Organizations Anthony Casey	3	3	177
LAWS 45801	Copyright Randal Picker	3	3	183
LAWS 94110	The University of Chicago Law Review Anthony Casey	1	1	P

Winter 2023

Course	Description	Attempted	Earned	Grade
LAWS 41101	Federal Courts Alison LaCroix	3	3	179
LAWS 45701	Trademarks and Unfair Competition Omri Ben-Shahar	3	3	175
LAWS 53201	Corporate Criminal Prosecutions and Investigations Andrew Boutros	3	3	179
LAWS 53256	Advanced Topics in Moral, Political, and Legal Philosophy: Marx's Phil. and Its 20th-Century Dev. Brian Leiter	3	0	
LAWS 94110	The University of Chicago Law Review Anthony Casey	1	1	P

Spring 2023

Course	Description	Attempted	Earned	Grade
LAWS 43208	Advanced Civil Procedure William Hubbard	3	3	176
LAWS 43244	Patent Law Jonathan Masur	3	3	177
LAWS 53472	Advanced Topics in Law and Computing Lior Strahilevitz	3	3	179
LAWS 94110	The University of Chicago Law Review Meets Substantial Research Paper Requirement Designation: Anthony Casey	1	1	P

End of University of Chicago Law School

Alison Gocke  
Associate Professor of Law  
580 Massie Road  
Charlottesville, VA 22903-1738  
Phone: 434.243.8545 | Fax: 434.982.2845  
Email: agocke@law.virginia.edu | www.law.virginia.edu

May 11, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to support Tanvi Antoo's application for a clerkship in your chambers. I taught Tanvi as her first-year legal research and writing professor. Additionally, Tanvi was my research assistant for several months in the summer of 2022. Over the course of my time with Tanvi, I came to know her as a good student, an excellent researcher, and a kind person. I believe she will make a skilled law clerk and a congenial presence in chambers.

As Tanvi's legal research and writing professor, I oversaw Tanvi's writing of two legal research memos and a legal brief. I also judged Tanvi in the first-year moot court oral argument simulation. Throughout the year, Tanvi completed small research and writing assignments. For each of these projects, I gave Tanvi detailed line edits and substantive feedback. Finally, I supervised Tanvi's drafting of a literature review for me for one of my research projects.

Based on these experiences, I can say that Tanvi is a capable student. From the beginning of her 1L year, Tanvi demonstrated an ability to read cases insightfully and creatively; she often spotted key details or facts of cases that others missed and understood how to incorporate them to make her arguments more persuasive. Tanvi is also a good writer. She writes clearly and persuasively. She is able to synthesize a wide range of sources and information and boil them down to their key components. She also quickly grasped the need not just to synthesize and summarize key information, but also to analyze it and fit it into a broader framework. I believe this is a key skill for law clerks, who need to be able not just to communicate information but to provide a framework through which issues and arguments can be analyzed.

Perhaps more importantly, Tanvi is also an incredibly hard worker and intellectually curious. As part of my assignment to Tanvi as my research assistant, I gave Tanvi a complicated and technical area of the law to research (I specialize in energy law and policy). I told her that I did not expect her to have any familiarity with this area of the law, as she had not taken administrative law or any other course that would introduce her to these topics. To my surprise and delight, Tanvi returned to me with an extensive body of research as well as a sophisticated knowledge of public utility regulation, how our electricity grid works, the technology behind rooftop solar and net metering programs, and issues around access and justice in our energy system. Along the way, Tanvi asked me some questions; but for the most part, Tanvi taught herself a good chunk of the legal and technical background necessary to complete her literature review. Tanvi also highlighted key questions and problems in the field that require further research, and I subsequently incorporated some of her suggestions into my Energy Law and Policy course at the University of Virginia. The level of work that Tanvi produced was something I would have expected out of a 2L or 3L, but not a 1L.

Incidentally, I had the sheer pleasure of reading early drafts of Tanvi's article, What is a "Ground"?: Form or Substance in PTO Estoppel, which is forthcoming as a Comment in the University of Chicago Law Review. I believe this article displays Tanvi at her best: someone who is able to become an expert in a highly technical field, communicate the complexities and nuances of that field to laypeople, and reveal interesting and undertheorized legal problems in that field that are both practically important and academically compelling. Tanvi came up with the idea for this article on her own; she was working as a legal intern at a law firm specializing in patent law, and noticed a Circuit split over an issue that was central to many of her cases. Tanvi dug into this problem, surfacing both the legal dimensions of the split and how this split is a microcosm for broader theoretical and institutional problems in the patent field. Through her own hard work, Tanvi composed an article that I believe will be helpful for practitioners and academics alike.

In sum, Tanvi is the kind of student who will work hard when given a particular topic to research and will develop expertise and insight in that topic. Given that this describes well the brief of a law clerk, I believe Tanvi will make an excellent clerk, and I encourage you to consider her candidacy. I would be delighted to talk more about Tanvi; please feel free to call me at 443-472-2036 or email me at agocke@law.virginia.edu.

Sincerely,

Alison Gocke  
Associate Professor of Law

Alison Gocke - agocke@uchicago.edu

**Professor Lior J. Strahilevitz**  
*Sidley Austin Professor of Law*  
The University of Chicago Law School  
1111 E. 60th Street  
Chicago, IL 60637  
[lior@uchicago.edu](mailto:lior@uchicago.edu) | 773-834-8665

May 25, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

Tanvi Antoo, a rising third-year student at the University of Chicago Law School, has applied for a position in your chambers as a law clerk. She has all the qualities of a terrific clerk, including a quick mind, a pleasant demeanor, admirable self-awareness, and top-shelf writing skills. I recommend her to you enthusiastically.

I have taught Tanvi in two classes at Chicago, a large first-year course called Elements of the Law, and a smaller seminar called Advanced Topics in Law and Computing. Elements introduces students to many of the key concepts that every lawyer needs, like an understanding of the common law method and stare decisis, the tradeoffs associated with rules versus standards, different approaches to reading legal texts, property rules and liability rules, slippery slopes, and questions of comparative institutional competence among the Congress, courts, and the executive. Along the way, students are exposed to several bodies of case law, though the goal of the class is to use the cases to illustrate ways of thinking about the law rather than mastering any particular set of doctrine. The Elements exam tests both theory and doctrine, and I tend to give the students problems grounded in bodies of law that have come up in class.

Tanvi's Elements exam was magnificent. I scored it as the fifth best examination in a 64 student class. The class was stacked with strong students but Tanvi's performance was sparkling even when measured against some of the most talented law students in the country. Tanvi's exam was beautifully written and intuitively organized with some superb turns of phrase. The front half of the exam asked students to write a judicial opinion resolving a hypothetical dispute over the 22<sup>nd</sup> Amendment's meaning, and Tanvi showed off her mastery of careful textualist analysis, purposivism, and pragmatic readings of the law. She displayed an excellent knack for eloquent writing too. In the margins next to her final paragraph I wrote, "I can hear the music swelling!" The exam's second question was a big-picture problem that asked the students to draw on course readings to evaluate a famous statement by Blackstone about the relationship between law and equity. The question threw many students for a loop (but not Tanvi) because it required them to slice through the course material in ways none of them were expecting. Tanvi excelled on each half of the examination. Her answers were very thoughtful, using the assigned readings in creative but altogether persuasive ways. At the very start of law school, Tanvi had already shown genuine talent as a lawyer.

Tanvi's performance in Advanced Topics in Law & Computing this past spring was also impressive. The seminar included 12 law students, 9 PhD students in Computer Science, and one Masters in Public Policy student. The interdisciplinary enrollment was by design, and I co-taught the class with a computer scientist. We assigned judicial opinions dealing with topics like the Computer Fraud and Abuse Act, the Communications Decency Act, electronic surveillance by the NSA, differential privacy and the US Census, artificial intelligence, de-identification and re-identification of data sets, and compelled decryption. We also assigned technical readings and videos by computer scientists explaining the underlying science. Each student in the seminar agreed to stretch themselves and explore material with which they were unfamiliar, and in its first iteration the interdisciplinary seminar turned out to be a great success. Tanvi's contributions to our collective learning were a big part of that.

Tanvi wrote a series of carefully crafted and creative short papers reacting to the assigned reading, and in addition to weekly participation in seminar discussions, she contributed ably to a group presentation with JD and PhD students. In fact, one thing that stood out to me about Tanvi's group's presentation was that a member of her group talked for far more than his allotted time – group presentations were limited to twenty minutes and he spoke for roughly ten. Tanvi was the last of the four students in the group to present, and she had about two and a half minutes to cover roughly five minutes of material. Rather than trying to squeeze too much content into a short amount of time she immediately made a decision to cut several slides and focus on her most important points. Whereas her classmate had floundered by pursuing ad-libbed tangents, Tanvi proved to be a skillful editor of her own presentation in real time, and she handled the situation with grace. Tanvi's participation in class discussion was also admirable. She displayed excellent listening skills and genuine enthusiasm for learning technical concepts in Computer Science despite her background as a philosophy and political science double major. There were several students who spoke more often during the seminar, but Tanvi more than held her own, and her comments often helped to synthesize debates or point towards unrecognized common ground. At the end of the seminar my fellow instructor and I both agreed that Tanvi deserved a 179, which is an honors level grade. (Students who graduate with a 179 average or better at Chicago earn Latin honors, a tall order at a school that remains allergic to grade inflation. Or, to use a different benchmark, grades of 179 or better are awarded at Chicago nearly as often as Honors-level grades at Stanford and Harvard Law Schools.)

In addition to being a strong student, Tanvi is a genuine delight as a person. Tanvi is the first American citizen in her family; her

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parents both immigrated from India and it took fourteen years for them to advance from green card holders to citizens, a wait that weighed on the entire family during that period. Her dad works as an IT consultant and her mom gave up her work as a data analyst to stay home and care for Tanvi and her younger brother. Tanvi's parents raised her to value education above all else, and she was a superb student at Santa Clara University, earning multiple awards for being the best student in Philosophy and graduating *magna cum laude*. Tanvi was admitted to several elite law schools but chose the University of Chicago because of its small size and emphasis on teaching and mentorship.

While excelling with academics, Tanvi has also become quite involved in our close-knit community, serving as an officer in both SALSA (the South Asian Law Students Association) and our vibrant ACS chapter. Though these past two years have been Tanvi's first time living outside the Bay Area (and experiencing real winters!) she has enjoyed her time in the Windy City, exploring its diverse neighborhoods, discovering its hidden gem eateries, and working on her abilities as a chef. As someone who came to law school with no lawyers in the family or in her extended network, she has been eager to pay it forward after learning the ropes, and she is currently mentoring several first-year South Asian students. She finds that work to be especially rewarding. Over the long term, Tanvi anticipates that she will become a litigator, probably focusing on intellectual property matters. Based especially on her terrific performance in the Advanced Topics in Law & Computing seminar this spring, I know she will do a wonderful job of bridging the divide between lawyers and technologists, and put her excellent writing and research skills to use.

What stands out most about Tanvi Antoo, even with her academic accolades, is that she's an especially fun, empathic, and kind woman. It's immediately apparent when you meet her that she is an authentic person who is comfortable candidly expressing her views, intuitively sees problems from many angles, and communicates effectively and fluidly. She is very easy to talk to and has a fine sense of humor, so she'll be a great clerk and an excellent colleague for her fortunate co-clerks.

If you are looking for a learned law clerk who will have the confidence to tell you what she really thinks about each case in a respectful but firm way, then Tanvi should be a particularly enticing candidate. It's a pleasure to support her application, just as it's been a joy to have her as my student.

Sincerely,  
Lior J. Strahilevitz

Lior Strahilevitz - [lior@uchicago.edu](mailto:lior@uchicago.edu) - 773-834-8665

June 06, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to offer a very strong recommendation of Tanvi Antoo for a judicial clerkship. Tanvi is an immensely diligent and dedicated student, someone who strives to produce the best possible work at every turn. She is bright and creative, as well as a skilled writer and analytic thinker. She has performed well in multiple classes and authored a terrific Law Review comment, which the journal is in the process of publishing. I am confident that she will be a successful law clerk.

I first met Tanvi when she enrolled in my Criminal Law class in Winter quarter of her 1L year. Even within a class of more than sixty-five highly talented students, it did not take me long to recognize Tanvi's intelligence. She quickly demonstrated real expertise in solving very difficult analytic legal problems, the type that crop up frequently in the criminal law. Perhaps even more importantly, she was expert at drawing connections between the day's subjects and topics or issues we had studied at earlier points in the course. This speaks both to Tanvi's intelligence and to her work ethic. It is easy for students to study only the reading scheduled for the current day, coasting through the course one reading assignment at a time. Tanvi, by contrast, was clearly hard at work throughout the quarter, studying old material and analyzing how it applied to the new subjects we encountered.

I called on her five times during the course: once to discuss the law of actionable omissions, once to analyze how drunkenness affects mens rea, twice regarding difficult topics in the law of felony murder, and once to discuss the law of complicity and how it relates to the requirement of causation. She was superb each and every time. In particular, her analysis of felony murder was dramatically different (and better) than what I have come to expect from 1Ls. She managed to tie the issue we were discussing—the “inherently dangerous” limitation to felony murder—to a subject related to proximate cause from a prior class. Few students can remember what we have discussed earlier in the same class, much less draw meaningful connections across subjects. Here, Tanvi was capable of accomplishing just that between subjects that were separated by weeks.

Tanvi finished the class by writing a good exam and received a strong grade. I have learned over the past two years that timed law school exams are not Tanvi's strong suit; her performance under those conditions often underrepresents how well she really knows the material and how good she is at thinking through complicated questions when given adequate time. Some students are born with the talent of taking law school exams; others have to learn it over the course of three years in law school. Tanvi seems firmly in the latter camp. Needless to say, however, law school exams are the most artificial part of law school; nothing in practice quite resembles them. I thus do not put much stock in exams when I know the student to be a talented thinker, as Tanvi clearly is.

During the summer between her 1L and 2L years, Tanvi was selected as a member of the University of Chicago Law Review. Her first task as a newly minted law review member was to select a topic for her law review comment, and much to my delight she hit upon an interesting and complex patent law topic. Patent law is one of my areas of academic expertise, so I was assigned to supervise the writing of Tanvi's comment. Doing so was an immense pleasure. The topic of her comment was the rule governing estoppel between patent litigation in federal district court and Inter Partes Review before the Patent and Trademark Office (PTO). The America Invents Act of 2011 created a process, known as Inter Partes Review, that allows anyone to file an action in front of the PTO challenging an existing patent and alleging that the patent is invalid and should not have been granted. These challenges are heard by three-judge administrative panels located within the PTO. If the three-judge panel agrees with the challenger and invalidates the patent, that decision is binding on the federal courts.

Accordingly, Inter Partes Review is popular among patent defendants who have been sued for infringement in federal court. They frequently respond to those suits by immediately filing an Inter Partes Review in front of the PTO. That raises the question of estoppel: if the defendant/challenger loses the Inter Partes Review, to what extent are they estopped from making the same invalidity arguments in federal court that they already made and lost before the PTO?

The relevant statutory section states that no party can attack a patent in federal district court on the same “grounds” on which it already tried and failed to attack the patent in the course of Inter Partes Review. But that language begs the question of what “grounds” are, and district courts have split on the issue. Some district courts have held that a “ground” is a particular piece of evidence: the challenger cannot put forward the same piece of evidence in district court that it tried and failed to use in the context of an Inter Partes Review. Other courts have held that a “ground” is an argument: the challenger cannot advance the same argument that has already failed in the Inter Partes Review, even if they make use of different pieces of evidence.

Based primarily on a close intra-textual reading of the America Invents Act, Tanvi compellingly concluded that the second group of district courts (“ground means argument”) was correct. In particular, she pointed to provisions in the statute that separately referenced “evidence” as an indication that “ground” must mean something different. She also expertly connected this argument with the goals and purposes of the America Invents Act, and Inter Partes Review more broadly, to show that the contrary view would not effectuate the goals of the statute in streamlining patent litigation and procedures. Her comment was incisive, clever, and thoroughly convincing. It was also smoothly and clearly written—a fine example of solid legal writing. It was remarkable to witness how she taught herself broad swaths of patent law and threw herself into a topic that she would never have given a second thought even a month earlier. Tanvi demonstrated that she is a true intellectual, excited about ideas and eager to think rigorously through important topics. Her comment has now been accepted for publication by the University of Chicago Law

Jonathan Masur - jmasur@uchicago.edu - 773-702-5188



Review, and on the basis of this comment Tanvi was chosen as a Comments Editor on the journal. I recommend this excellent piece of student work to you very strongly.

After this experience, I was delighted when Tanvi enrolled in Spring 2023 in my course on Patent Law. Knowing her expertise in patent law, throughout the quarter I reserved the privilege of calling on Tanvi for occasions when I wished to pose a particularly tricky question to the class. I was never disappointed with the result. During the second week of class I asked her a difficult series of questions related to Motionless Keyboard and the public use bar, which she handled with incredible ease and facility. Then, a week later, I challenged her to explore and analyze the Supreme Court's *Myriad* decision. Her answers were both thoughtful and insightful, and they expertly combined her comprehensive knowledge of biology with marked legal intuition and reasoning ability. Similarly superb cold calls regarding obviousness (*KSR*), literal infringement (*Phillips*), and reasonable royalty damages (*LaserDynamics*) followed in due course across the next several weeks. If there was any doubt that Tanvi had acquired a comprehensive and thorough understanding of patent doctrine, these experiences erased it.

Her exam was of a piece with her impressive work during class. In particular, she handled an extremely challenging question about infringement and invalidity—one that required the students to consider literal infringement, infringement by the equivalents, written description, enablement, and obviousness in one fell swoop—with incredible dexterity and expertise. It also became clear that Tanvi could do more than work with doctrine; she understood patent policy at a deep level, and she had acquired real legal intuition regarding how Federal Circuit judges decide cases. Her exam earned a high grade, one that would have been even higher were I not bound by a stringent grading curve. I do not know whether Tanvi will end up working as a patent litigator (though I hope so), and of course she may find herself in a clerkship that involves only relatively little patent law. Nonetheless, her obvious facility with intricate federal statutes and bodies of caselaw augur well for her ability to thrive in any challenging federal clerkship.

Finally, after supervising her law review comment and watching her become an expert in patent law before my eyes, I was delighted when Tanvi indicated that she was interested in working for me as a research assistant. I hired her on the spot. Despite the fact that she was balancing her time as a research assistant with writing her comment and doing all of her typical schoolwork, Tanvi managed to complete two projects for me. The first involved patent law: I asked her to research a line of cases involving the patent law doctrine of public use, under which patents can be invalidated if the inventions underlying them are put on display by their inventors. This was a subject that Tanvi had not yet studied, and I was asking her to excavate a line of cases that has largely been overlooked and poorly understood. Yet she performed fabulously. She found an entire series of cases that I did not know existed, and she wrote a brilliant and insightful research memo laying out the importance of these cases and the best way to synthesize and understand the relevant doctrine. It was fabulous work, and her findings now form the backbone of an article titled "Real-World Prior Art" that Professor Lisa Ouellette (Stanford) and I will soon be publishing in the *Stanford Law Review*.

For the second project, I asked Tanvi for help with something entirely different: research on the laws and norms surrounding marriage in mid-Twentieth Century India. This related to a project I was pursuing on the depiction of Indian marriage law in works of literature, and Tanvi again engaged with the legal research with great enthusiasm and intelligence. Drawing upon primary sources, she assembled a comprehensive picture of the Indian law and norms surrounding marriage, and in the course of a research memorandum she expertly situated it within the relevant socio-cultural context. Her work went well beyond anything I might have expected from a 2L, and again it showed her ability to teach herself entirely new areas of law on the fly. Tanvi's research now forms the backbone of a paper that I am writing with Professor Seebany Datta-Barua (Illinois Institute of Technology), and I could not be more grateful for her assistance.

In sum, Tanvi Antoo is a smart and talented student, a careful and mature thinker, and a diligent researcher and sharp writer. I should add as well that she is incredibly generous with her time and a great colleague to her peers—the sort of person who will be immensely well-liked in chambers. She will be an asset to any judge who hires her and a favorite among any group of co-clerks who work with her. I recommend her very highly.

Sincerely,

Jonathan Masur  
John P. Wilson Professor of Law

## Tanvi Antoo

5454 S. Shore Dr., Apt 1010, Chicago, IL 60615 | (925) 998-8473 | [tanviantoo@uchicago.edu](mailto:tanviantoo@uchicago.edu)

### Writing Sample

The attached writing sample is an excerpt from my student Comment, which will soon be published in *The University of Chicago Law Review*. I performed all of the research and have personally written this piece. I have received feedback from my *Law Review* editors, from Professor Alison Gocke, and from my Comment Advisor, Professor Jonathan Masur. The writing in this excerpt is my own. I have discussed which sections to excerpt with my school's writing coach. I have omitted the Introduction; the first portion of Part I, which provides background on the patent system in general and on the purpose of the Patent Trial and Appeal Board; Part III, which discusses the pragmatic considerations and institutional questions associated with this question; and the Conclusion. The writing sample begins with Part I.B, an explanation of the district court split. Below is my abstract, which provides an overview of the piece:

*This Comment seeks to resolve a dispute among district courts over how to interpret the term “ground” in 35 U.S.C. § 315(e)(2), the America Invents Act’s estoppel provision. The question of whether a party that asserts a printed publication or patent in an inter partes review (“IPR”) proceeding is estopped from asserting real-world prior art, such as a system or device, in a later civil action under § 315(e)(2) has resulted in a district court split. Some courts have construed the estoppel provision narrowly, reasoning that because a physical object like a device is not something that could have been raised during IPR, estoppel cannot apply. Under this interpretation, “ground” is interpreted to mean a piece of evidence. Because physical products are not the same type of evidence offered during IPR, litigants are not estopped from using them in later civil actions. On the other side of this, courts have determined that estoppel can apply, but does not in situations where the physical object being raised is either “superior and separate” or presents a “substantive difference” to the paper prior art raised in the IPR. Here, “ground” is interpreted to mean argument, such that estoppel applies when the device offers no new arguments other than those already put forth during the IPR—in other words, when litigation would be duplicative. The resolution to this question carries significant consequences for the cost, efficiency, and institutional division of labor of the patent system.*

*This Comment argues that the AIA’s text and purpose supports adopting the substantive difference approach. This approach strikes a workable balance in focusing on the legal arguments to ensure that litigants are not receiving an undue second bite at the apple by being able to re-litigate the same arguments already decided by the Patent Trial and Appeal Board. The substantive difference approach is supported by the text and advances the AIA’s purpose in offering inter partes review as a cheaper, faster alternative to district court litigation. It also promotes a reasonable division of responsibilities between the PTAB and district courts. Overall, as this Comment explains, this interpretation best aligns with the patent system’s goals.*

## Undefined “Ground”: Form or Substance in PTO Estoppel

### PART I: LEGAL BACKGROUND

#### B. The District Court Split

This Section explains the case law surrounding the interpretive disagreement over the term “ground.” It is useful to examine the AIA’s text at this juncture. An invention can be represented both by a printed publication and by an actual device. The AIA, however, limits IPR proceedings to prior art consisting of patents or printed publications. Under § 311 of the AIA, “[a] petitioner in an inter partes review may request to cancel as unpatentable 1 or more claims of a patent only on a *ground* that could be raised under section 102 [novelty] or 103 [obviousness] and *only on the basis of prior art consisting of patents or printed publications.*”<sup>54</sup> A petitioner that asserts paper prior art<sup>55</sup> in an IPR proceeding “may not assert either in a civil action . . . or in a proceeding before the International Trade Commission . . . that the claim is invalid on any *ground* that the petitioner *raised or reasonably could have raised* during that inter partes review.”<sup>56</sup>

District courts have fallen into two general camps in interpreting the estoppel provision, each of which is explained below. One camp, utilizing “the form approach,” interprets “ground” to refer to the specific piece of prior art.<sup>57</sup> In this situation, *real-world* prior art (like a device) takes a different form than the *paper* prior art (like a patent or catalogue) raised during IPR, and therefore estoppel does not apply. The other camp, utilizing the “substance approach,” interprets “ground” to mean “argument.”<sup>58</sup> These courts are not looking at the precise form of prior art being relied upon—i.e., whether it is a printed publication versus a device—but rather at whether a different argument is being made when the device is invoked for the first time as prior art in district court litigation.

To better understand this distinction, recall for a moment the camera from the Introduction’s example. In that scenario, the courts applying the form approach would hold that the “ground” raised during the IPR was the product manual itself. In contrast, courts applying the substance approach would hold that the ground was the particular substantive argument made about whether the product manual had all of the elements of the patent and thus made the patent ineligible as non-novel. The second camp interprets ground to mean “argument,” such that the inquiry turns on whether the real-world prior art supports an argument for invalidity not raised by the paper prior art previously assessed by the PTAB. Within this substance-based camp, some courts have required that a claim meet a “superior and separate” standard, while others have taken a “substantive difference”

<sup>54</sup> 35 U.S.C. § 311(b).

<sup>55</sup> It is worth noting that IPR’s limitation to paper prior art could be argued to be an arbitrary line, and that it may make sense to allow devices to be introduced during IPR proceedings. The argument for this limitation is likely one based in efficiency concerns and the need for IPR to be a speedy proceeding. But, allowing devices or other real-world prior art in IPRs would solve the confusion over estoppel in district courts. Though outside the scope of this Comment’s line of argumentation, this is a point that bears acknowledging.

<sup>56</sup> 35 U.S.C. § 315(e)(2).

<sup>57</sup> *See, e.g., Biscotti Inc. v. Microsoft Corp.*, 2017 WL 2526231, at \*8 (E.D. Tex. May 11, 2017) (“Biscotti argue[d] that Microsoft intend[ed] to assert certain systems as prior art to the asserted claims, yet Biscotti characterize[d] this system prior art as printed subject matter in disguise, i.e., subject matter that could have been raised during IPR proceedings,” the court pointed to § 311(b)’s language to reach the conclusion that “Microsoft therefore could not have raised a prior art ‘system’ during IPR proceedings”).

<sup>58</sup> *See, e.g., Wasica Fin. GmbH v. Schrader Int’l, Inc.* 432 F. Supp. 3d 448, 454–55 (D. Del. 2020), appeal dismissed, 2020 WL 8374870 (Fed. Cir. Sept. 24, 2020).

approach. The following subsections highlight the form camp and the substance camp in turn. Within the substance camp, both subsidiary approaches will also be described and distinguished.

### 1. The Form Approach

The form approach adopts a narrow reading of § 315(e)(2). The basic idea is that the “ground” is the particular piece of prior art—i.e., a product manual. What follows as a consequence of this interpretation is that, because real-world prior art cannot be raised in an IPR, estoppel cannot apply to any argument for invalidity in district court supported by real-world prior art. For example, in *Chemours Co. FC, L.L.C. v. Daikin Indus., Ltd.*,<sup>59</sup> the District Court for the District of Delaware concluded that, “[a]s a matter of statutory interpretation, estoppel does not apply to [ ] prior-art products . . . regardless of whether those products are ‘cumulative’”<sup>60</sup> of the paper prior art used in the IPR. The court held that “§ 315(e)(2) does not estop an IPR petitioner's use in litigation of an invalidity theory that relies upon [real-world prior art] as a prior art reference because a prior art product cannot be used as a reference to challenge the validity of a patent claim in an IPR,” and, thus, “any invalidity theory relying upon that [real-world prior art] as a prior art reference is not a ‘ground’ that reasonably could have been raised during the IPR.”<sup>61</sup>

The *Chemours* court also considered congressional purpose when interpreting the estoppel provision. The court noted that “[t]he statute at issue was the product of considered debate and careful thought,” and that Congress “could have broadened the categories of prior art on which IPR could be requested,” or specified that estoppel would apply to a device disclosing the same arguments covered by the paper art in the IPR, but did not do so. The court chose to adhere to “well-accepted canons of construction” while stating that “it is not for this Court to ignore Congress’s omission and create additional bases for estoppel.”<sup>62</sup> It is worth noting that the court did not specify what those well-accepted canons are.

Echoing the *Chemours* court’s reasoning, other courts taking the form approach have agreed that “[e]stoppel does not extend to other types of prior art, such as prior-art devices . . . Therefore . . . defendants can rely on the prior-art systems in their invalidity contentions to argue anticipation or obviousness.”<sup>63</sup> In *Medline Indus., Inc. v. C.R. Bard, Inc.*,<sup>64</sup> Medline sought to estop Bard from pursuing any invalidity grounds that relied upon its physical products, arguing estoppel on the basis of § 315(e)(2).<sup>65</sup> The District Court for the Northern District of Illinois read “ground” to mean the “specific piece of prior art or combination of prior art that a petitioner raised, or could have raised, to challenge the validity of a patent claim during an IPR.”<sup>66</sup> This reading again embraces the view that “any invalidity theory relying upon that product as a prior art reference is not a ‘ground’ that reasonably could have been raised during the IPR.”<sup>67</sup>

<sup>59</sup> 2022 WL 2643517 (D. Del. Jul. 8, 2022).

<sup>60</sup> *Id.* at \*1.

<sup>61</sup> *Id.*, citing *Medline Indus., Inc. v. C.R. Bard, Inc.*, 2020 WL 5512132, at \*3 (N.D. Ill. Sept. 14, 2020). An invalidity theory is a reason put forth to support the invalidity defense, an assertion that the “patent holder did not satisfy the basic requirements to obtain a patent, usually because the claimed invention was not novel or would have been obvious when it was invented.” Roger A. Ford, *Patent Invalidity Versus Noninfringement*, 99 CORNELL L. REV. 71, 73–74 (2013).

<sup>62</sup> *Id.*

<sup>63</sup> *CliniComp Int'l, Inc. v. Athenahealth, Inc.*, 2020 WL 7011768, at \*2 (W.D. Tex. Oct. 28, 2020).

<sup>64</sup> 2020 WL 5512132 (N.D. Ill. Sept. 14, 2020).

<sup>65</sup> *Id.* at \*3.

<sup>66</sup> *Id.* at \*4 (emphasis added).

<sup>67</sup> *Id.*

The *Medline* court made a similar argument to *Chemours* about congressional purpose, noting that:

If Congress had wanted to estop an IPR petitioner from pursuing invalidity grounds that relied upon a physical product in a particular situation, such as where a patent or printed publication discloses the same claim limitations as the product, it could have provided language to that effect. Congress did not do so, and this failure indicates that Congress did not intend for the IPR estoppel provision to be that broad.<sup>68</sup>

*Medline* caveats that an IPR petitioner avoids statutory IPR estoppel only if actually relying upon a product or product-related evidence, meaning that a litigant must demonstrate that they are making an argument based on the product.<sup>69</sup>

These cases hold that the AIA’s text uses “ground” to mean “specific piece of prior art,” and thus precludes an interpretation that would apply estoppel to real-world prior art, like devices. The use of the camera from the example in the Introduction would never be estopped in district court because a party could not have raised it during IPR—even if, per the *Chemours* court’s interpretation, the camera revealed no new information from what had already been disclosed during IPR. A litigant that can raise a physical product like the camera would always be allowed to do so due to the limitation to patents and printed publications that constrains IPR.

## 2. The Substance Approach

Courts that take the substance approach—which generally agree that “ground” means “argument” rather than piece of prior art—fall into two camps. The first calls for a “superior and separate standard,” which requires that the new ground being asserted derives from a superior reference (meaning more probative) that is separate from that invoked during IPR. Under this approach, the court must determine whether “the physical product discloses features that are not included in the printed publication.”<sup>70</sup> The standard “requires certain claim limitations to be independently satisfied by prior art in a way that is different from an associated prior art patent or printed publication.”<sup>71</sup>

The second is a “substantive difference” approach that asks for, as the name suggests, a relevant substantive difference between the arguments for invalidity deriving from the paper prior art and from the device being subsequently asserted.<sup>72</sup> The key point is that the superior and separate standard is about the reference itself—it asks whether the device discloses something above and beyond the references used in the IPR. By contrast, the substantive difference standard is about the argument—the question is whether the argument being made in district court is in some way different than the argument made in the IPR. This subsection explains both standards and argues that the substantive difference approach is the better of the two.

<sup>68</sup> *Id.*

<sup>69</sup> *Medline*, 2020 WL 5512132 at \*4.

<sup>70</sup> Christian Karpinski, *Patent Owners Face Unknown Arguments as to Whether IPR Estoppel Attaches to Physical Products*, 19 UIC REV. INTELL. PROP. L. 328, 339 (2020).

<sup>71</sup> *Id.* at 339. Claim elements are also referred to as claim “limitations” because they add an element to the invention’s scope, and thus limit the class of infringing devices or processes to those that also have that limitation. See MASUR & OUELLETTE, *supra* note 2, at 28.

<sup>72</sup> *Caltech*, 2019 WL 8192255, at \*8.

*a. Superior and Separate*

What the court looks for in a superior and separate determination is a demonstration that the “physical system [ ] establish[es] certain functionalities (or a lack thereof) that are not present in the printed publications.”<sup>73</sup> For example, if the sales catalog of the Acme camera from the Introduction contained a claim for a hyper-responsive on-off button, a court applying the superior and separate standard would apply estoppel if the camera had nothing more than that same on/off button in physical form. Under this standard, the button itself simply represents a claim already raised by the sales catalog. By contrast, estoppel would not apply if the sales catalog did not describe the button, and the device was brought forth in district court to prove the hyper-responsive button functionality—this would be a new functional element, not present in the sales catalog. The focus is whether the device being asserted reveals some new element or function—perhaps, for example, upon physical deconstruction—that was not covered by any of the paper prior art in IPR.

The case most cited for the superior and separate standard is *Star Envirotech, Inc. v. Redline Detection, LLC*.<sup>74</sup> In *Star Envirotech*, the plaintiff alleged that the defendant, Redline, had infringed its ’808 patent<sup>75</sup>—a utility patent for a smoke and clean air generating machine for detecting the presence and location of leaks in a fluid system (e.g. the evaporative or brake system of a motor vehicle)—for its product, the Leakmaster.<sup>76</sup> Redline filed an unsuccessful petition for IPR, where it put forth the patent as paper prior art.<sup>77</sup> In the district court proceeding, *Star Envirotech* argued that though the LeakMaster itself could not have been admitted in the IPR, Redline could have instead put forward the LeakMaster’s owner’s manual, which Redline had in its possession at the time of the IPR.<sup>78</sup> The court disagreed with this argument, finding that “the physical machine itself discloses features claimed in the ’808 Patent that are not included in the instruction manual, and it is therefore a superior and separate reference.”<sup>79</sup> To substantiate this reasoning, the District Court for the Central District of California pointed to claim nine of the ’808 patent, which requires “locating a heating element within a closed smoke producing chamber,” and noted that the LeakMaster’s instruction manual does not describe the closed smoke producing chamber, but the device itself, “if disassembled, could shed light on whether it practices this claim limitation.”<sup>80</sup>

*Contour IP Holding, LLC v. GoPro, Inc.*<sup>81</sup> illustrates another situation where a device was not estopped under this approach. Contour alleged that GoPro improperly sought to “relabel prior art references in order to make the same invalidity arguments and circumvent the application of estoppel.”<sup>82</sup> GoPro, on the other hand, claimed that estoppel is not so broad and that it could assert prior art references used during IPR, so long as those were combined with art not reasonably available during IPR.<sup>83</sup> GoPro sought to raise the GoPro HD Motorsports HERO video camera, which it could not have raised during IPR. The court, citing *Star Envirotech*, agreed with GoPro that it was not estopped from using the real-world prior art, as “GoPro avers that the product itself has

<sup>73</sup> *Acceleron, LLC v. Dell, Inc.*, 2020 WL 10353767 at \*3 (N.D. Ga. Mar. 30, 2020).

<sup>74</sup> 2015 WL 4744394 (C.D. Cal. Jan. 29, 2015).

<sup>75</sup> *Id.* at \*1.

<sup>76</sup> US PAT 6526808.

<sup>77</sup> *See Star Envirotech*, 2015 WL 4744394 at \*3–4.

<sup>78</sup> *Id.* at \*4.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> 2020 WL 109063 (D. Del. Jan 9, 2020).

<sup>82</sup> *Id.* at \*6.

<sup>83</sup> *Id.*

functionality that was not reflected in the GoPro Sales Catalog used during IPR,” and “as long as this is true, GoPro is not estopped.”<sup>84</sup>

*b. Substantive Difference*

The substantive difference standard undertakes a more holistic inquiry that does not tie itself to specific patent claims, but instead analyzes whether some germane difference exists between the paper and real-world prior art. This approach operates at the level of the theory argued, while the superior and separate standard operates at the level of the piece of prior art.

Recall the hypothetical hyper-responsive on-off button included in the camera’s sales catalog. Now, imagine that the device is asserted to show that the hyper-responsive switch utilizes touch sensitivity and has a response time of one-eighth of a millisecond. Under the superior and separate standard, estoppel would still apply. The button on the camera is the button being described in the catalog. But estoppel might not apply under the substantive difference standard. This is because the catalog simply referenced the switch without explaining its features further, whereas the argument being made now is different—it focuses on sensitivity and response time. (Of course, sensitivity and response time would have to be germane to the case in some fashion or else the camera would not be *substantively* different.)

In *Cal. Inst. of Tech. v. Broadcom Ltd.*,<sup>85</sup> in the course of a patent infringement suit, the District Court for the Central District of California confronted the question of whether statutory IPR estoppel can preclude a party challenging a patent from arguing that the patent was non-novel or obvious using a reference related to a printed publication that could have been asserted in the IPR.<sup>86</sup> The court declined to apply any standard “that would require, for instance, that certain claim limitations be independently satisfied by prior art in a way that is different from an associated prior art patent or printed publication,” noting that the “statute does not include such requirements, and they would likely extend the reach of statutory IPR estoppel beyond its intended scope.”<sup>87</sup> While the court did not believe that an invalidity theory needs to provide disclosure of an independent claim limitation not provided by the printed publication, it did clarify that “there must be *some substantive* difference between the two theories that is germane to the invalidity dispute at hand.”<sup>88</sup> The court felt that the superior and separate standard went too far, as “redundant” prior art grounds do appear commonly in patent litigation.<sup>89</sup> The focus should instead be on an attempt “to discern if a patent challenge is simply swapping labels for what is otherwise a patent or printed publication invalidity ground.”<sup>90</sup>

Building upon this, the court in *DMF, Inc. v. AMP Plus, Inc.*<sup>91</sup> provided reasoning similar to that used in *Caltech* and further explained that the question should be about what a party is trying to do through its challenge. In an infringement suit over a patent for recessed lighting, DMF argued that ELCO, the other party in this case, was estopped from asserting prior art invalidity grounds based on a physical product because ELCO did not show that the physical product raised any issues

<sup>84</sup> *Id.*

<sup>85</sup> 2019 WL 8192255 (C.D. Cal. Aug. 9, 2019), *aff’d*, 25 F.4th 976 (Fed. Cir. 2022).

<sup>86</sup> *See id.* at \*6.

<sup>87</sup> *Id.* at \*7.

<sup>88</sup> *Id.* at \*8 (emphasis in original).

<sup>89</sup> *Id.* at \*7.

<sup>90</sup> *Id.*

<sup>91</sup> 2021 WL 6499980 (C.D. Cal. May 5, 2021).

different from those that it did or could have raised in the IPR.<sup>92</sup> In its analysis, the District Court for the Central District of California emphasized *Caltech*'s conclusion that the superior and separate reference standard "appear[s] to apply a higher standard than is contemplated by the IPR statute."<sup>93</sup>

The *DMF* court found instead that the relevant question is whether the patent challenge was simply swapping labels in order to bypass estoppel and "cloak" its prior art ground, and thus applied the substantive difference standard.<sup>94</sup> To the court, ELCO's argument that it independently relied on its product was persuasive, because the catalog descriptions of the product did not disclose its features.<sup>95</sup> Under a superior and separate standard, the catalog descriptions would likely have been found to have disclosed the features arguably disclosed by the product, and the inquiry would have focused on whether the new argument spoke to something that hadn't been at all described in the catalog. Instead, applying the substantive difference standard, the court found that the product was "substantively, germanely different" for three of the disputed grounds.<sup>96</sup>

Just as courts on the form side of the split have turned to the AIA's text, so too have courts on the substance side. In *Wasica Fin. GmbH v. Schrader Int'l, Inc.*,<sup>97</sup> Wasica brought an action against a competitor, alleging infringement of a patent for a sensor that monitors air pressure in the air chamber of pneumatic tires.<sup>98</sup> The court noted that 35 U.S.C. § 312(a)(3) "identifies as separate requirements to be included in an IPR petition 'the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge to each claim.'"<sup>99</sup> This usage illustrates that "the Patent Act distinguishes between grounds and evidence," and "[s]ince the estoppel provision, § 315(e)(2), applies to grounds, a petitioner is estopped from proceeding in litigation on those grounds, even if the evidence used to support those grounds was not available to be used in the IPR."<sup>100</sup> In this case, the court found that estoppel applied because the products disclosed the same claim elements, and, thus, all of Schrader's obviousness grounds reasonably could have been raised during the IPR.<sup>101</sup> The *Wasica* court's construction of the statute presents an excellent contrast to that in *Chemours*, as it comes out the other way utilizing the grounds versus evidence distinction.

These cases illustrate how courts considering whether a party is estopped from asserting a piece of real-world prior art, such as a device, undertake an individualized inquiry into whether there is a germane difference between the device and paper prior art. These courts appear to be attempting to limit the same infringement arguments from being litigated twice, but to still allow a device to be raised in the district court proceeding when it is bringing something useful and different to the litigation.

Courts have worried that the superior and separate standard's focus on the references themselves risks unduly expanding estoppel.<sup>102</sup> Indeed, the camera hypothetical above illustrates how a simple descriptor like "button" would, under the superior and separate standard, foreclose

<sup>92</sup> *Id.* at \*3.

<sup>93</sup> *Id.* at \*4.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at \*5.

<sup>96</sup> *DMF*, 2021 WL 6499980 at \*5–6.

<sup>97</sup> 432 F. Supp. 3d 448 (D. Del. 2020) (collecting cases), *appeal dismissed*, 2020 WL 8374870 (Fed. Cir. Sept. 24, 2020).

<sup>98</sup> *Id.* at 451.

<sup>99</sup> *Id.* at 454 (emphasis in original).

<sup>100</sup> *Id.*

<sup>101</sup> *Wasica*, 432 F. Supp. 3d at 455.

<sup>102</sup> *Caltech*, 2019 WL 8192255, at \*7 ("The statute does not include such requirements, and they would likely extend the reach of statutory IPR estoppel beyond its intended scope").



subsequent arguments that do present something relevantly different for a court to consider. The superior and separate standard “ignores a commonly found practice in patent litigation: using one prior art reference to meet the same claim limitations in a number of different invalidity arguments.”<sup>103</sup> The substantive difference standard allows for a balancing of efficiency with litigants’ interest in obtaining a fair review of their arguments.

## PART II: STATUTORY INTERPRETATION AND MAKING SENSE OF THE SPLIT

With the district court split explained, the AIA itself may be examined to determine which approach should be adopted. The two main camps that district courts have fallen into on this question—form versus substance—are a product of the statutory ambiguity in defining the term “ground.”<sup>104</sup> Indeed, the AIA does not explicitly define it, thus allowing this issue to arise. This Part has two main objectives. The first is to conduct a textual analysis of the relevant statutory provisions that aims to elucidate how the text has led the district courts to arrive at opposite interpretations. The second is to explore the Act’s purpose. This Part concludes that a statutory interpretation supports the adoption of the substantive difference approach.

### A. Undertaking a Textual Analysis

#### 1. Relevant Statutory Provisions

The primary provision at issue in this split is 35 U.S.C. § 315(e), which establishes estoppel in district court litigation after parties have gone through IPR proceedings. Section 315(e)(2) states,

[t]he petitioner in an inter partes review of a claim in a patent under this chapter that results in a final written decision [. . .] or the real party in interest or privy of the petitioner, may not assert either in a civil action [. . .] that the claim is invalid on any *ground* that the petitioner raised or reasonably could have raised during that inter partes review.<sup>105</sup>

An analysis of § 315(2) benefits from a comparison to 35 U.S.C. § 312’s language and usage of the term “ground.” § 312(a)(3), which outlines the requirements of an IPR petition filed under § 311,<sup>106</sup> states that a petition must identify:

in writing and with particularity, each claim challenged, the *grounds on which the challenge to each claim is based*, and the *evidence that supports the grounds* for the challenge to each claim, including—(A) copies of patents and printed publications that the petitioner relies upon in support of the petition; and (B) affidavits or declarations of supporting evidence and opinions, if the petitioner relies on expert opinions.<sup>107</sup>

<sup>103</sup> Karpinski, *supra* note 70 at 342.

<sup>104</sup> 35 U.S.C. § 315(e).

<sup>105</sup> 35 U.S.C. § 315(e)(2) (emphasis added).

<sup>106</sup> 35 U.S.C. § 311(b) states: “A petitioner in an inter partes review may request to cancel as unpatentable 1 or more claims of a patent only on a ground that could be raised under section 102 or 103 and only on the basis of prior art consisting of patents or printed publications.”

<sup>107</sup> 35 U.S.C. § 312(a)(3) (emphasis added).

Courts, like the district court in *Wasica*, have utilized the language in § 312(a)(3) to conclude that “ground” should be interpreted based on substance, and understood to mean “argument,” because of the distinction made between grounds on which the challenge to each claim is based and the evidence that supports the grounds.

## 2. A Textual Analysis

A textual analysis reveals two plausible interpretations of the term “ground,” each of which aligns with the form or substance side of the split. This section explains both and argues that the better interpretation—the one adopted by the substance-based camp—rests upon an analysis that takes into account the entirety of the text rather than just a single provision.

Courts on the form side of the split have narrowly interpreted the § 315(e) estoppel provision. Recall the *Chemours* court’s analysis of the estoppel provision: “any invalidity theory relying upon [a] product as a prior art reference is not a ‘ground’ that reasonably could have been raised during the IPR” because “a prior art product cannot be used as a reference to challenge the validity of a patent claim in an IPR.”<sup>108</sup> Here, “ground” is being interpreted as referring to what was presented during IPR. A device could not have been raised during IPR. Therefore, a device is not a ground that was raised, and nor could it reasonably have been raised. So, under this interpretation, estoppel never applies to real-world prior art like devices. This narrower, textualist reading has the strength of adhering closely to the provision’s words. Section 315 does not distinguish grounds from anything else, and § 311 is clear that IPR is limited to “prior art consisting of patents or printed publications.”<sup>109</sup> The statute, then, does not explicitly provide an indication that real-world prior art is subject to estoppel, and a lack of support in the text for finding estoppel has made courts wary of extending it.

However, per the Whole Act Rule, a canon of statutory interpretation widely used by courts, statutory text should be construed as a whole.<sup>110</sup> Because a statute generally contains interrelated parts, the entirety of the document provides context for each of these individual—but interrelated—parts.<sup>111</sup> Typically, “only one of the possible meanings that a word or phrase can bear is compatible with use of the same word or phrase elsewhere in the statute.”<sup>112</sup> If this is true—and it makes good sense to take it as such—then the interpretation of §§ 311 and 312(a)(3) is relevant to the interpretation of § 315(e)(2).

The *Wasica* court’s statutory interpretation of § 312(a)(3) underscores how the substantive view takes on this more holistic interpretive methodology. According to *Wasica*, § 312(a)(3)

identifies as separate requirements to be included in an IPR petition ‘the *grounds* on which the challenge to each claim is based, and the *evidence* that supports the grounds for the challenge to each claim.’ In this way, the Patent Act distinguishes between grounds and evidence. Since the estoppel provision, § 315(e)(2), applies to *grounds*, a petitioner is estopped from

<sup>108</sup> *Chemours*, 2022 WL 2643517 at \*2, citing *Medline Indus., Inc. v. C.R. Bard, Inc.*, 2020 WL 5512132, at \*3 (N.D. Ill. Sept. 14, 2020).

<sup>109</sup> 35 U.S.C. § 311(b).

<sup>110</sup> See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 167 (West Group, 2011).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 168.

proceeding in litigation on those grounds, even if the evidence used to support those grounds was not available to be used in the IPR.<sup>113</sup>

As the statutory text shows, “grounds” and “evidence” are, in fact, distinguished. The phrase “grounds on which the challenge to each claim is based,” juxtaposed with, “and the evidence that supports the grounds for the challenge to each claim”<sup>114</sup> indicates that “grounds” are arguments for which “evidence” is offered as support. Again, this would mean, in application, that the estoppel provision’s usage of “ground” refers to the arguments being raised. If estoppel applies to “any ground” (interpreted to mean “argument”), an assessment of substance in the later civil proceeding would be required. In essence, this all rests on the question of whether “ground” means a *piece of evidence* or an *argument*.

In addition, § 311(b) states that “[a] petitioner in an inter partes review may request to cancel as unpatentable [one] or more claims of a patent only on a *ground* that could be raised under section 102 [novelty] or 103 [obviousness] and only on the *basis* of prior art consisting of patents or printed publications.”<sup>115</sup> Section 311’s use of “basis,” read in light of § 312, should be understood as an *evidentiary* basis, and its use of “ground” should be read to mean *argument*. If this is the case, then “ground” would have a consistent meaning in §§ 311, 312, and 315 that is distinct from “evidence” or “basis.”

The distinction between “ground” and “evidence” must factor into how “ground” is interpreted in other sections of the statute. If “ground”—as it is used in §§ 311 and 315(e)(2)—is interpreted to mean evidence, then it would not be distinct from the word “evidence” used in § 312(a)(3). This provides a persuasive reason to believe that “ground” in § 315 means argument and should not be interpreted to mean evidence.

With all this in mind, the substantive difference approach is the most textually compelling method of resolving the district court split. Given the text’s differentiation of the terms, “ground” should be interpreted to mean “argument” rather than “evidence.” In contrast, the text of the AIA does not support the form approach. It would make little sense to equate “ground” and “evidence” when they are differentiated elsewhere in the statute—a differentiation that should inform how § 315(e)(2) is read. While it’s true that parties cannot raise real-world prior art in an IPR, § 311(b)’s language—“only on the basis of prior art consisting of patents or printed publications”<sup>116</sup>—does not undermine the argument that if “ground” were interpreted to mean “evidence” rather than “argument,” the word “evidence” as it is used in the statute would no longer be distinct.

## B. The Purpose of Estoppel

The AIA’s legislative history indicates that Congress wanted the estoppel provision to be drawn more broadly to avoid re-litigation of the same arguments in federal court. This suggests that the form approach wouldn’t go far enough in furthering the purpose of estoppel. Two pieces of evidence support this idea: (1) that Congress applied estoppel to civil actions and (2) that it applied estoppel both to claims raised and that *could have been* raised in IPR proceedings. First, the provision at issue, § 315(e)(1)–(2), estops claims that have been decided by the PTAB in an IPR from being

<sup>113</sup> Wasica Fin. GmbH v. Schrader Int’l, Inc 432 F. Supp. 3d 448, 454 (D. Del. 2020) (collecting cases), *appeal dismissed*, 2020 WL 8374870 (Fed. Cir. Sept. 24, 2020) (emphasis in original).

<sup>114</sup> 35 U.S.C § 312(a)(3).

<sup>115</sup> 35 U.S.C § 311(b) (emphasis added).

<sup>116</sup> 35 U.S.C § 311(b).

raised once again in front of both the USPTO and in civil actions.<sup>117</sup> If Congress had intended to allow the re-litigation of arguments that had already been adjudicated in an IPR, it would not have applied estoppel to civil actions. But, under the form approach, even if there is no substantive difference between the paper prior art asserted during the IPR and the real-world prior art a party seeks to use to substantiate a district court proceeding, then the same argument can be litigated twice. It seems unlikely that Congress, in crafting an Act that was intended to promote efficiency, would have wanted such an inefficient and duplicative outcome. The inclusion of the “civil actions and other proceedings” subsection to the provision makes clear that written decisions resulting from an IPR are meant to be a final say on that invalidity claim and streamline proceedings.<sup>118</sup>

Second, the AIA’s legislative history indicates that the estoppel provision’s inclusion of the “could have raised” phrase was both carefully considered<sup>119</sup> and emphasized, resulting in a strong estoppel provision that courts should maintain. Legislators proposed repealing the “could-have-raised” estoppel, which is a clearly expansive application of estoppel meant to reduce the likelihood of duplicative challenges.<sup>120</sup> But patent owners objected and the AIA preserved that estoppel application.<sup>121</sup> While the central concern of this Comment is the meaning of “ground,” the legislative discussion surrounding the “could have raised” language is instructive in determining the legislative intent driving the statutory construction. IPR itself was intended to provide a more efficient and cost-effective alternative to district court proceedings. The legislative history of the Act is littered with references to the stronger estoppel standard that made its way into the final version of the Act. For example, Senate reports note the AIA’s “higher threshold for initiating a proceeding” and “strengthened estoppel standard.”<sup>122</sup>

Given that the legislative history of the AIA indicates that the goal of the IPR system is to avoid re-litigation of the same invalidity claims and same arguments, “ground” should be interpreted to mean “argument.” And, with this, the substantive difference approach should be adopted to allow for determination of whether, in fact, the same *argument* is being raised twice. Construing the estoppel provision in a manner that would, as a bright-line rule, allow real-world prior art to be used in district courts to relitigate decided-upon claims would run counter to what the AIA aimed to accomplish with its strengthened estoppel standard. Still, it is worth considering the point—as made in *Chemours*—that if Congress intended for estoppel to apply to real-world prior art, it would have or could have stated that. However, the *Chemours* court misses addressing the purpose of AIA estoppel. It’s fair to say that the best resolution of this question would be Congressional clarification. Absent that, however, courts should keep in mind the broad purpose of the statute: efficiency, which is supported by strong estoppel.

To be sure, estoppel should not be applied as a blanket rule. There are cases where the device being asserted does present something new for consideration and aids the party’s argument in a way

<sup>117</sup> 35 U.S.C. § 315(e)(1)–(2).

<sup>118</sup> 35 U.S.C. § 315(e)(2).

<sup>119</sup> See Matal, *supra* note 47, at 616–20.

<sup>120</sup> See, e.g., 157 CONG. REC. S1326 (daily ed. Mar. 7, 2011) (statement of Sen. Sessions) (“The bill also includes many protections that were long sought by inventors and patent owners. It preserves estoppel against relitigating in court those issues that an inter partes challenger reasonably could have raised in his administrative challenge.”).

<sup>121</sup> See 157 CONG. REC. S1367 (daily ed. Mar. 8, 2011) (statement of Sen. Kohl) (“Patent protection will be stronger with the inclusion of ‘could have raised’ estoppel [and] strong administrative estoppel.”).

<sup>122</sup> See 157 CONG. REC. S952 (daily ed. Feb. 28, 2011) (statement of Sen. Grassley). See also *America Invents Act: Hearing on H.R. 1249 Before the Subcomm. on Intellectual Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 52 (2011) (statement of Rep. Zoe Lofgren) (“[T]here is significant disincentive to bring an action because in the litigation, anything that could have been raised can’t be used.”).

that was not (and could not reasonably have been) addressed during the IPR. For example, the court in *GoPro* determined that GoPro's product averred functionality not reflected in the paper prior art, demonstrating that there was something new to litigate. This would, therefore, be a new argument—or, a new “ground”—to raise, and estoppel should not apply. The substantive difference approach results in both the most equitable interpretation and application of § 315(e)(2), and the distinction between “grounds” and “evidence” in the text ensures that new grounds can still be raised. The system should ensure that patent validity claims are fairly and thoroughly litigated. And, to the extent that a device may offer an analysis that would simply not be possible to conduct with paper prior art alone during an IPR, a party will not unduly receive another bite at the apple but would instead be given the opportunity to fully flesh out their claim in the civil proceeding.

## Applicant Details

First Name **Rosemary**  
 Middle Initial **N.**  
 Last Name **Ardman**  
 Citizenship Status **U. S. Citizen**  
 Email Address [rdman@umaryland.edu](mailto:rdman@umaryland.edu)

Address

<b>Address</b> <b>Street</b> <b>1300 Saint Paul Street, #5</b> <b>City</b> <b>Baltimore</b> <b>State/Territory</b> <b>Maryland</b> <b>Zip</b> <b>21202</b> <b>Country</b> <b>United States</b>
--

Contact Phone Number **5128156058**

## Applicant Education

BA/BS From **University of Texas-Austin**  
 Date of BA/BS **December 2015**  
 JD/LLB From **University of Maryland Francis King Carey School of Law**  
[http://www.nalplawsonline.org/ndlsdir\\_search\\_results.asp?lscd=52102&yr=2011](http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=52102&yr=2011)  
 Date of JD/LLB **May 30, 2024**  
 Class Rank **5%**  
 Law Review/Journal **Yes**  
 Journal(s) **Maryland Law Review**  
 Moot Court Experience **No**

## Bar Admission

### **Prior Judicial Experience**

Judicial  
Internships/            **Yes**  
Externships  
Post-graduate  
Judicial Law           **No**  
Clerk

### **Specialized Work Experience**

#### **Recommenders**

Hoffmann, Diane  
dhoffmann@law.umaryland.edu  
(410) 706-7191

Carstens, Anne-Marie  
acarstens@law.umaryland.edu

Graber, Mark  
mgraber@law.umaryland.edu  
(410) 706-2767

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

June 5, 2023

The Honorable Jamar Walker  
U.S. District Court for the Eastern District of Virginia  
600 Granby Street  
Norfolk, VA 23510

Dear Judge Walker:

Please consider my enclosed application for a clerkship in your chambers for the 2024-2025 term. I am currently a student at the University of Maryland Carey School of Law and will graduate in 2024. As the new Editor in Chief of the *Maryland Law Review* and a long-time employee of the ACLU of Maryland, my unique professional and academic experience has prepared me to support the work of your chambers.

My unusual path to a legal career drives my deep commitment to public service. I started college at the age of thirteen and began supporting myself financially a few years later, and I now attend law school while working full-time for the ACLU. Throughout my teens, I struggled with the challenges of being on my own at such a young age, transferring schools and taking time off in response to financial and familial challenges. My experience persevering through these obstacles—and ultimately graduating with honors from the University of Texas—instilled me with compassion, curiosity, and resilience that continue to guide my professional goals.

In law school, I have gained research and writing experience that prepares me to effectively contribute to the work of your chambers. As the new Editor in Chief of the *Maryland Law Review*—and the first evening student to ever hold that role—I collaborate with top scholars around the country to publish innovative academic work, and I lead a time of fifty students through a complex and tight publication process. This opportunity to engage deeply with legal scholarship across a variety of fields positions me to thrive in the diverse work of judicial clerk.

I also have significant practical legal experience, particularly at the federal level. This summer, I am gaining exposure to federal civil litigation through an internship with the Special Litigation Section of the Civil Rights Division of the Department of Justice. Last year, I interned with the Federal Public Defender for the District of Maryland, where I drafted motions, prepared internal strategic memoranda, and observed a variety of federal criminal proceedings. Additionally, I have spent over six years as the assistant to the ACLU of Maryland's Executive Director, a role that has prepared me for the sensitive and collaborative nature of a judicial clerkship.

Within, please find my resume, my law school and undergraduate transcripts, two writing samples, and three letters of recommendation. Thank you very much for your consideration.

Sincerely,



Rosemary Ardman



## ROSEMARY NADIA ARDMAN

512-815-6058 | rardman@umaryland.edu | 1300 Saint Paul Street #5, Baltimore, MD 21202

### EDUCATION

**University of Maryland Carey School of Law** | Baltimore, MD | J.D. Candidate | Expected May 2024 | GPA 4.17

Honors: Editor in Chief, *Maryland Law Review*, Volume 83  
 Paul D. Bekman Leadership in Law Scholar  
 Sondheim Public Service Law Fellow  
 Shale D. Stiller Public Interest Fellow  
 CALI Award (highest grade): Criminal Law, Lawyering I, Lawyering II, Legal Profession,  
 Constitutional Law I, Constitutional Law II, Lawyering III, Torts, Employment Law,  
 Comparative Jurisprudence

International Coursework:

Zomba, Malawi: Environmental Justice, Public Health, and Human Rights (May 2023)  
 Galway, Ireland: Comparative Constitutional Democracy (June 2022)

**University of Texas at Austin** | Austin, TX | B.A. English with Honors | Dec. 2015 | GPA 3.84

Honors: James F. Parker Memorial Essay Prize Runner-Up

### PROFESSIONAL EXPERIENCE

**Special Litigation Section, Civil Rights Division, U.S. Department of Justice** | Washington, D.C.

*Legal Intern*

*May 2023–Present*

Assist with investigations into systemic unlawful conduct by state and local officials related to conditions of confinement, juvenile justice, and the institutionalization of people with disabilities. Complete legal research and writing projects to support litigation and compliance monitoring.

**ACLU of Maryland** | Baltimore, MD

*Executive Coordinator & Board Liaison*

*Apr. 2021–Present*

Manage projects for the Executive Director and Board of Directors. Serve on the Strategic Planning Leadership Team. Coordinate administrative and logistical matters for the executive department. Facilitate staff meetings. Supervise administrative support staff and volunteers.

*Executive Assistant*

*Feb. 2017–Apr. 2021*

Provided administrative support to the Executive Director and Board of Directors. Managed filing systems and archival projects. Assisted with office operations.

*Acting Development Associate*

*May 2017–June 2019*

Drafted grant proposals and reports worth over \$750,000 annually in areas including criminal justice reform, immigrants' rights, fair housing, and education rights. Planned and executed philanthropic campaigns. Managed the development database.

*Legal and Policy Intern*

*Oct. 2016–Feb. 2017*

Drafted legal documents and advocacy materials for a lawsuit challenging juvenile life without parole. Processed requests for legal assistance and corresponded with clients.

**University of Maryland Carey School of Law** | Baltimore, MD

*Senior Legal Writing Fellow*

*Aug. 2022–Present*

Provide feedback on student legal and scholarly writing. Lead 1L writing workshops and drop-in sessions. Offer guidance and support to incoming Legal Writing Fellows.

*Legal Writing Fellow*

*Aug. 2021–May 2022*

Competitively selected as one of eleven second-year students to staff the Writing Center, lead student writing workshops, and perform research and cite checking for legal writing faculty.

*Research Assistant to Professor Michael Millemann*

*May 2021–May 2022*

Prepared research memos on criminal sentencing and prisoners' rights. Performed cite checking and substantive editing on scholarly articles.

**Juvenile Division of the Circuit Court for Baltimore City** | Baltimore, MD

*Judicial Intern*

*Sep. 2022–Dec. 2022*

Conducted legal research in the areas of juvenile delinquency and child welfare to support the work of six magistrates in the Juvenile Division. Observe Child in Need of Assistance and delinquency hearings.

**Federal Public Defender for the District of Maryland** | Baltimore, MD

*Legal Intern*

*May 2022–Aug. 2022*

Assisted with the defense of indigent clients in the federal criminal system by conducting research and drafting legal filings including motions to suppress evidence, grant compassionate release, and terminate supervised release. Attended client meetings and court proceedings.

**PUBLICATIONS**

*The Larry Nassar Hearings: Victim Impact Statements, Child Sexual Abuse, and the Role of Catharsis in Criminal Law*, 82 MD. L. REV. 782 (2023), <https://digitalcommons.law.umaryland.edu/mlr/vol82/iss3/7/>.

**COMMUNITY INVOLVEMENT**

**Maryland Public Interest Law Project** | *Co-Treasurer*

*Aug. 2020–Present*

Oversee a budget of \$150,000 for a student-run 501(c)(3) nonprofit dedicated to providing grants to students pursuing unpaid summer public interest internships.

**University of Maryland Carey School of Law** | *Peer Advisor*

*May 2023–Present*

Provide mentorship and academic support to first-year law students.

**Maryland Parole Project** | *Legal Volunteer*

*Dec. 2021–Feb. 2022*

Reviewed and summarized trial documents to help prepare an exoneration argument for a client convicted of murder. Contributed to a guide to the parole process for lawyers representing individuals serving life sentences.

**Student Bar Association** | *Evening Class Vice President*

*Sep. 2020–May 2023*

Served as a liaison between the evening class, the student body, and the school administration. Planned class activities and events.

**REFERENCES**

**Professor Leslie Meltzer Henry**

Professor, University of Maryland Carey School of Law  
703-599-7860 | [lmeltzer@law.umaryland.edu](mailto:lmeltzer@law.umaryland.edu)

**Professor Peter Danchin**

Professor and Director of International & Comparative Law Program, University of Maryland Carey School of Law  
443-527-0377 | [pdanchin@law.umaryland.edu](mailto:pdanchin@law.umaryland.edu)

**Professor Michael Millemann**

Professor, University of Maryland Carey School of Law  
410-294-0954 | [mmillem@law.umaryland.edu](mailto:mmillem@law.umaryland.edu)

**Professor William Moon**

Assistant Professor, University of Maryland Carey School of Law  
203-392-4466 | [wmoon@law.umaryland.edu](mailto:wmoon@law.umaryland.edu)

**Ms. Dana Vickers Shelley**

Executive Director, ACLU of Maryland  
410-980-3754 | [dana@aclu-md.org](mailto:dana@aclu-md.org)

**Ms. Laura Abelson**

Assistant Public Defender, Office of the Public Defender for the District of Maryland  
443-851-0903 | [laura\\_abelson@fd.org](mailto:laura_abelson@fd.org)

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Academic Transcript

(/StudentSelfService/)

Ms. Rosemary Nadia Ardman

Student Academic Transcript

## Academic Transcript

### Transcript Level

School of Law

### Transcript Type

Academic Record

### Student Information

Degrees Awarded

Institution Credit

Transcript Totals

Course(s) in Progress

This is not an official transcript. Courses which are in progress may also be included on this transcript.

### Student Information

#### Name

Rosemary Ardman

### Curriculum Information

#### Current Program : Juris Doctor

#### Program

Law Evening

#### Major and

#### Department

Law, Law

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Academic Transcript

## Degrees Awarded

**In Progress**

Juris Doctor

## Curriculum Information

**Primary Degree**

**Major**

Law

## Institution Credit

Term : Fall 2020

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	506E	LW	CRIMINAL LAW	A+	3.000	12.99		
LAW	527E	LW	CIVIL PROCEDURE	A	4.000	16.00		
LAW	550E	LW	INTRODUCTION TO LEGAL RESEARCH	A	1.000	4.00		
LAW	564E	LW	LAWYERING I	A	2.000	8.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	40.99	4.10
Cumulative	10.000	10.000	10.000	10.000	40.99	4.10

Term : Spring 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	534E	LW	PROPERTY	A	4.000	16.00		
LAW	558H	LW	LEGAL PROFESSION	A+	3.000	12.99		
LAW	565E	LW	LAWYERING II	A	3.000	12.00		

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Academic Transcript

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	40.99	4.10
Cumulative	20.000	20.000	20.000	20.000	81.98	4.10

### Term : Fall 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	528E	LW	CON LAW I: GOVERNANCE	A+	3.000	12.99		
LAW	530E	LW	CONTRACTS	A	4.000	16.00		
LAW	566E	LW	LAWYERING III	A+	3.000	12.99		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	41.98	4.20
Cumulative	30.000	30.000	30.000	30.000	123.96	4.13

### Term : Spring 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	514Q	LW	COMP JURIS SEM:TRANSCULTURE	A	3.000	12.00		
LAW	529A	LW	CON LAW II: INDIVIDUAL RIGHTS	A+	3.000	12.99		
LAW	535E	LW	TORTS	A+	4.000	17.32		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	42.31	4.23
Cumulative	40.000	40.000	40.000	40.000	166.27	4.16

### Term : Summer 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	563M	LW	SPEC TOP IN COMP CONST'L DEMOC	CR	2.000	0.00		

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Academic Transcript

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	2.000	2.000	2.000	0.000	0.00	
Cumulative	42.000	42.000	42.000	40.000	166.27	4.16

## Term : Fall 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	515D	LW	CRIMINAL PROCEDURE	A	3.000	12.00		
LAW	531C	LW	MARYLAND LAW REVIEW	CR	1.000	0.00		I
LAW	544S	LW	ASPER JUDICIAL EXT WORKSHOP	CR	1.000	0.00		
LAW	554F	LW	EMPLOYMENT LAW	A+	3.000	12.99		
LAW	579B	LW	EXTERNSHIPS	CR	2.000	0.00		
LAW	595S	LW	ENV JUS, HUMAN RGTS & PUB HLTH	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	13.000	13.000	13.000	9.000	36.99	4.11
Cumulative	55.000	55.000	55.000	49.000	203.26	4.15

## Term : Spring 2023

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	503C	LW	INTERNATIONAL LAW	A+	3.000	12.99		
LAW	505S	LW	REPRODUCTIVE JUSTICE & LAW SEM	A+	3.000	12.99		
LAW	506F	LW	ADVANCED LEGAL RESEARCH	A-	1.000	3.67		
LAW	528K	LW	HLS:COMP HLTH LAW & POLICY	A+	3.000	12.99		
LAW	531C	LW	MARYLAND LAW REVIEW	CR	1.000	0.00		I

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	11.000	11.000	11.000	10.000	42.64	4.26
Cumulative	66.000	66.000	66.000	59.000	245.90	4.17

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Academic Transcript

## Transcript Totals

Transcript Totals - (School of Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	66.000	66.000	66.000	59.000	245.90	4.17
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	66.000	66.000	66.000	59.00	245.90	4.17

## Course(s) in Progress

Term : Fall 2023

Subject	Course	Level	Title	Credit Hours	Start and End Dates
LAW	531C	LW	MARYLAND LAW REVIEW	4.000	
LAW	544K	LW	INTERNATIONAL LABOR LAW: SEM	3.000	
LAW	578B	LW	EVIDENCE	3.000	
LAW	583F	LW	FEDERAL COURTS	3.000	

Dear Judge,

I am writing this letter with the highest of enthusiasm in support of the application of Rosemary Ardman, who is seeking a clerkship in your chambers. Rosemary is one of the best students that I have taught in my over twenty-five years as a law professor. She is an incisive and creative thinker, her analytic and communication skills are outstanding, and she is exceptionally motivated and personable – qualities that I believe, would make an outstanding judicial clerk.

I met Rosemary in Spring 2022, when she was a first-year evening student in my Torts class at the University of Maryland Carey School of Law. She has also taken two additional courses with me, and I have gotten to know her a bit outside of the classroom.

Rosemary stood out early in the Torts class as an exceptionally bright student performing impressively in all aspects of the course. She received the highest grade for class participation, was consistently well prepared and able to answer any question I put to her. Also, her performance on the exam was exceptional, leading her to receive the highest grade in the class – A+.

This past fall (2022), Rosemary was a student in a course I co-taught, entitled “Environmental Justice, Human Rights and Public Health.” The course is innovative in that half of the students are from the University of Maryland Carey School of Law and half from Chancellor College at the University of Malawi, where they are starting an Environmental Law Clinic. There were 14 students in the class last fall. Students at Maryland participated together in a classroom, but everyone was also on Zoom in order that students from Malawi could participate. Lecturers were from Maryland faculty as well as faculty, judges and legal practitioners from Malawi and South Africa. Again, Rosemary stood out among the students. She was always prepared and asked astute and interesting questions of the speakers. Her intellectual curiosity stood out among all the students. For their final projects, the students from Maryland and Malawi worked in teams to address an environmental, human rights and/or public health problem facing Malawi. The students drafted papers recommending legal strategies to accomplish stated goals on various issues including deforestation, air degradation from cook-top stoves, sewage pollution from non-functioning sewage treatment plants, and pollution of a river used by area residents for bathing and cleaning. Rosemary’s group did a stellar job on their paper and Rosemary received an A for the course. It was the consensus of all three faculty for the seminar that Rosemary was an exceptional student.

In addition to the fall 2022 course, Rosemary was a student this past Spring semester (2023) in my Comparative Health Law seminar, which has 14 law students and four medical students. Again, Rosemary was a standout student in terms of class participation. I counted on her as the law student in the class who could explain Tort, Constitutional and other legal concepts to the medical students in the class. She has a good grasp of the law and is able to explain it clearly to students who lack a legal background. Rosemary’s seminar paper, Mental Illness and Medical Aid in Dying: A Comparative Legal Analysis of Assisted Dying for Psychiatric Patients in Belgium, Canada, Switzerland, and the United States, was hands down the best paper in the class. She did an exemplary job describing the law and its history in each country on whether to permit individuals with a mental illness to participate in physician assisted dying. Further, she critically evaluated the strengths and weaknesses of each country’s approach to the contentious issue, scrutinized the case law on the topic and identified gaps in legal reasoning as well as the implications of permitting individuals with mental illness to take advantage of this “service.” She is a strong and persuasive writer and received the highest grade in the class on her paper as well as for the Seminar as a whole, i.e., an A+.

Rosemary’s intellectual curiosity and capacity has not only impressed me but also other members of the faculty who have had her as a student. She is one of those students that faculty discuss because they are so impressed with their intellectual capacity. Last semester I was a member of our Appointments Committee, and we brought in numerous candidates who we were considering in the hiring process. As part of that process, we ask a handful of students to meet with each candidate. When we were looking for students to meet with one candidate, I immediately thought of Rosemary as I knew she would have no problem engaging with the candidate in a sophisticated manner, asking her not only about her teaching style and rapport with students, but also about her research and scholarship. She did not disappoint. In fact, she read the job talk paper of the candidate in advance of meeting with her and asked her probing questions about it.

I believe Rosemary’s success in law school thus far reflects the exceptional potential that she has demonstrated in my classes. In addition to her high standing in her law school class she was recently elected editor of the Maryland Law Review. Rosemary’s work at the ACLU, her internships at the public defender’s office and the Juvenile Division of the Baltimore City Circuit Court also indicate a serious intent to pursue a career in law. She is a motivated and disciplined student who will without a doubt be a successful advocate.

I also believe that Rosemary has both the dedication and the intellectual acumen to be an outstanding judicial clerk. She is not only one of the brightest students that I have taught, she is one of the most collegial and personable and no doubt would be an asset to your chambers. I therefore recommend her highly and without reservation to be your judicial clerk.

Please do not hesitate to contact me if there is any further information that I can provide.

Sincerely,

Diane E. Hoffmann  
Jacob A. France Professor of Health Law  
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June 07, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to enthusiastically recommend Rosemary Ardman—recently elected Editor-in-Chief of the Maryland Law Review—for a judicial clerkship in your chambers. Rosemary currently maintains a 4.15 GPA, an impressive feat made possible by earning the coveted A+ top grades. Even more impressive, though, she has accomplished these credentials while working full-time at the ACLU Maryland. Her ability to balance these two particularly challenging tasks side-by-side shows her brilliance and ability to manage competing responsibilities. In addition, she is, quite simply, one of the most generous and engaging law students in our community.

Rosemary easily possesses the writing, analytical, and leadership skills to succeed in a clerkship. I have gotten to know her well over the past two+ years, in two capacities. First, she was the No. 2 student in my Civil Procedure class during Fall 2021, which took place online due to the coronavirus and in which she missed the top spot by the thinnest of hairs. She was always prepared, made thoughtful contributions to our classroom conversations, and demonstrated her facility with analytical puzzles and difficult doctrines. Second, I have worked closely with Rosemary over the past two years as a legal writing fellow in our student fellows program, which I supervise. She has always been willing to pitch in to solve every exigency—a student seeking writing support during the middle of the exam period at a professor's urging, for example—and maintains a genuine predisposition toward helping others.

Rosemary also has a very personal and compelling backstory that forced her to develop self-sufficiency at a very young age. Suffice it to say that she has thrived and succeeded against daunting odds.

Despite this, and as suggested above, Rosemary radiates an engaging and warm nature that make her an ideal candidate for sharing the close quarters of a judicial chambers. I am always glad to see her in the halls and feel invested in her success for her commitment to being not only the best law student, but also the best community supporter she can be.

I hope you will consider Rosemary for a clerkship in your chambers, for which I recommend her whole-heartedly. Please contact me if you have any questions.

Sincerely,

Anne-Marie Carstens  
Director of Lawyering & Law School Assistant Professor

Anne-Marie Carstens - acarstens@law.umaryland.edu

June 07, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Dear Judge Walker:

I am honored to recommend Ms. Rosemary Ardman for a federal or state judicial clerkship. Excellence Scholarship. Ms. Ardman was a student in the Constitutional Law sequence that I taught at the University of Maryland Carey School of Law during the 2021-22 academic year. She was also a student in the joint Maryland/Galway Comparative Constitutional Democracy I taught in Ireland with Professors Ioanna Tourkochoriti and Peter Danchin. Ms. Ardman's performance in the Constitutional Law sequence was spectacular. She earned an A+ in both Constitutional Law I (Governance, Fall 2021) and in Constitutional Law II (Rights, Spring 2022). She had the highest examination grade in the fall semester and in the spring semester. This is the best two semester performance of any student I have taught in twenty years at the law school. Ms. Ardman exhibited the same high standards in Ireland. Although the class was graded pass-fail, she demonstrated preparation and acumen equal to many of the younger scholars who presented in the class. Ms. Ardman is not simply the strongest student I will be recommending this year; she is high in the top-five of any student I have ever recommended for a clerkship.

Ms. Ardman was a star in both Constitutional Law I and Constitutional Law II, even before the examination. Her attendance was perfect in mind and body. Every class she sat in the fifth row, left hand side (from my perspective, from her perspective, she was on the right-hand side). Evening classes at Maryland are often quite talkative, and the 2021-22 class was no exception. Even when we were on Zoom, Ms. Ardman consistently volunteered in class. She was particularly active and articulate when women's issues were raised. She is a committed supporter of abortion rights and comparative worth. Nevertheless, Ms. Ardman was happy to share her opinions on issues as diverse as whether Wayfair could escape South Dakota's sales tax (dormant commerce clause) and when environmental regulations are inconsistent with the commerce clause. She was one of the most respected voices in the class. Ms. Ardman was as poised and intelligent when called upon in class. I use an expert system. Students are notified beforehand that they are expected to be experts on at least three cases each semester. We then have an approximately fifteenth minute discussion on case facts, case theories, case holdings and case consequences. Ms. Ardman was excellent in all of these dimensions. She could explain case facts to a person who had no clue who the parties were, detailed the legal strategies both sides used, discussed the central themes in all opinions, and give her views on whether the case was rightly decided. Her summaries were crisp and to the point. Her arguments were persuasive without being polemical.

Ms. Ardman's final examinations did not disappoint, to say the least. My final examinations consist of three parts. The first is a multiple choice, which frankly is designed to ensure that anyone who did the reading passes the course. I think Ms. Ardman got no more than 2-3 questions wrong out of 60. The second is the classic law school issue spot. I give students a hypothetical and ask them to identify possible constitutional violations. Ms. Ardman had no problem identifying the correct clauses, correct precedents, and correct tests. I threw a few tricks at the students (burying, for example, a state action problem in a free speech case). Ms. Ardman saw through me. Hers were the rare examinations that saw every issue. I suspect most of the very minor deductions reflected my desire to find some excuse to take off points somewhere. Ms. Ardman really shone on the take home portion of the class. On this part, I ask students to be advocates, making the strongest arguments for their positions. In the spring, I asked students that on the assumption that Dred Scott was wrongly decided, Lochner was wrongly decided, and Brown was rightly decided, should the Supreme Court overrule Roe v. Wade (by coincidence the final occurred the day the draft opinion leaked). Ms. Ardman penned a terrific essay. She pointed out that Taney claimed to be an originalist, so one should not use originalism to resolve fundamental rights problems, that personal rights at stake in abortion cases differed from the economic rights at stake in Lochner, and that Brown properly understood was about dismantling status hierarchies. In short, the cases everyone in the legal profession agrees were wrongly decided and those the profession agrees are rightly decided, all involved principles that Ms. Ardman maintained justified keeping abortion legal. The essay was well-organized and demonstrated a powerful grasp of how lawyers use canonical and anti-canonical cases in the past to advance their present causes.

Ms. Ardman really shone in the Ireland program. Students were expected to participate in a professional conference on the comparative law of religion and anti-discrimination law, then attend and comment on a number of faculty presentations. No one not looking at the name tags would know that Ms. Ardman was a student and not an assistant professor. She came to each presentation prepared to discuss some fairly complex papers. She developed a nuanced understanding of the problems of protecting both religion and minorities. I particularly remember her comments on the Jewish Day School case in the United Kingdom. The Jewish Day School is a very elite private school that insists Jews either have Jewish mothers or have a conversion ceremony. Ms. Ardman noted that this was discrimination based on birth, that the Jewish Day School received considerable state benefits, so could not so discriminate, even though the school accepted under different standards non-Jewish standards. Her ability to navigate the differences between discrimination law in the United States and the United Kingdom was superb, as was her sensitivity to all sides of the issues. As noted in a previous paragraph, Ms. Ardman has opinions and holds many of them strongly, but she is able to articulate them professionally in ways that show respect for all persons. Many scholars credited Ms. Ardman's comments with improving papers they will be publishing in a forthcoming academic volume.

I have reviewed Ms. Ardman's record and writings before writing this letter, and both are nothing short of amazing. Her GPA at Maryland Carey is not only close to perfect, but she has had the highest grades in at least half the classes she has taken. Her student note on the Larry Nassar hearings would be a plus on the tenure file of a faculty member. Ms. Ardman explores the role of

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the testimony of childhood sexual abuse in the sentencing of a doctor who abused one girl after another as team physician for USA Gymnastics. The paper is sophisticated on law, philosophy, and psychology. Ms. Ardman recognized the powerful effect of testimony of the victims of Nassar's abuse, but she points out that the focus on Nassar's abuse shone the spotlight exclusively on Nassar and not on the numerous social conditions that should have been known that might have ended the abuse earlier. Everyone's desire for medals had powerful effects shutting people's eyes to what should have been obvious. As long as Americans continue to emphasize winning Olympic goal, abusive relationships in women's sports are likely to continue. This is a paper that merits a very wide audience for the conclusion, for the painstaking research that supported the conclusion, and for the excellent writing.

In short, Ms. Ardman is one of the strongest and possibly the strongest candidate Maryland Carey Law has had for a clerkship in a very long time. I cannot recall a single student who got the highest grade in both of my classes, not to mention the highest grade in about eight other classes. Ms. Ardman has done this while holding down a full-time job, being active in the Maryland Public Interest Community, and writing a superb law review note. She is now the incoming editor of the Maryland Law Review. She has all the attributes of a successful clerk. She manages time well. She expresses herself clearly in speech and writing. She can grasp and explain sophisticated concepts to the unwashed. As important, she is a charming individual. She was a delight to work with. For all these reasons and many more, Ms. Ardman has the strongest recommendation I can give for a federal or state judicial clerkship.

If there is any more information you need about this outstanding young lawyer in the making, I can be reached at the University of Maryland Carey School of Law (500 W. Baltimore Street, Baltimore, MD 20201), at 410-706-2767 or at [mgraber@law.umaryland.edu](mailto:mgraber@law.umaryland.edu). Thank you for your kind consideration.

Yours truly,

Mark A. Graber  
Regents Professor  
UM Carey School of Law

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**Writing Sample #1**

The following writing sample is a portion of an internal memorandum written for a summer internship with the Federal Public Defender for the District of Maryland. Our client was convicted of drug trafficking conspiracy for transporting large quantities of marijuana. He initially retained the services of a lawyer known for publicity stunts, and his counsel advised him to reject a generous plea offer in favor of a jury trial, which counsel was confident would result in acquittal due to the popularity of marijuana legalization. Our client was convicted at trial and received a lengthy prison sentence. Our office took over his case and sought a new trial, arguing our client's previous attorney performed deficiently under the Sixth Amendment. In the following memorandum, I set out the best strategy for asserting that our client received ineffective assistance of counsel during plea negotiations. The work is entirely my own with no editing from others.

### Analysis

The Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To provide proficient representation, counsel must perform “within the range of competence demanded of attorneys in criminal cases.” *Strickland*, 466 U.S. at 687-88 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Though the Court has not set out specific guidelines, an attorney’s conduct must accord with prevailing professional norms during all critical phases of the proceedings, including plea negotiations. *Missouri v. Frye*, 566 U.S. 134, 140 (2012); *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). To successfully raise an ineffective assistance of counsel claim, *Strickland* sets out a two-pronged standard. 466 U.S. at 687. A defendant must show, first, that counsel performed deficiently and, second, that this prejudiced the case’s outcome. *Id.*

**I. CLIENT’s Sixth Amendment right to effective counsel was violated by his attorney’s unreasonable advice during plea negotiations, which led CLIENT to reject a plea offer far less severe than the sentence range he now faces.**

CLIENT’s previous attorney’s failure to reasonably advise him regarding the plea deal constitutes deficient performance under the Sixth Amendment, and this prejudiced the outcome of his case because CLIENT would have otherwise accepted the plea and now faces a significantly longer sentence. Counsel’s obligation to perform proficiently applies not only at trial, but during “all ‘critical’ stages of the criminal proceedings,” particularly pretrial plea negotiations. *Frye*, 566 U.S. at 140 (quoting *Montejo v. Louisiana*, 566 U.S. 778, 786 (2009)). As the Supreme Court articulated in *Lafler*, “[C]riminal justice today is for the most part a system of pleas, not a system of trials.” 566 U.S. at 170. With ninety-seven percent of federal convictions resulting from guilty pleas, “the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing

convictions and determining sentences.” *Id.*; see *Frye*, 566 U.S. at 143-44. When advice by counsel leads a client to reject a plea offer, the *Strickland* test for ineffective assistance requires demonstrating, first, that the advice fell below a reasonable professional standard and, second, that the defendant would have received a better outcome had he accepted the plea. See *Lafler*, 566 U.S. at 174.

**A. CLIENT’s counsel performed deficiently by misunderstanding fundamental legal issues, making unreasonable predictions about trial outcomes, and giving contradictory advice.**

CLIENT’s counsel’s strategy rested on a deep misunderstanding of Maryland constitutional law and an absurd faith that a jury would nullify CLIENT’s verdict due to the popularity of marijuana legalization. To deliver constitutionally sufficient assistance, an attorney must “provide . . . competent and fully informed advice, including an analysis of the risks that the client would face in proceeding to trial.” *Burt v. Titlow*, 571 U.S. 12, 25 (2013) (Sotomayor, J., concurring). While courts generally presume that an attorney performed acceptably, the lack of basic competence regarding legal analysis and advice constitutes defective representation. *Dodson v. Ballard*, 800 F. App’x 171, 177 (4th Cir. 2020). For example, counsel’s failure to perform relevant research, raise important issues, or generally demonstrate “legal competence” deprives a client of the right to counsel. *United States v. Carthorne*, 878 F.3d 456, 466 (4th Cir. 2017). Lawyers may reasonably pursue a variety of strategies, but courts’ deference to attorneys’ tactics does not apply when a decision “made no sense or was unreasonable.” *Id.* at 467 (citing *Vinson v. True*, 436 F.3d 412, 419 (4th Cir. 2006)). Likewise, though an erroneous prediction alone is not ineffective assistance, patently unrealistic advice about likely trial outcomes violates a defendant’s Sixth Amendment rights. See *Steele v. United States*, 321 F. Supp. 3d 584, 590 (D. Md. 2018) (finding that counsel’s inaccurate advice to defendant “as to the realities of the

sentence he faced or the odds stacked against him” was ineffective assistance); *United States v. Stockton*, No. MJG-99-0352, 2012 WL 2675240, at \*11-12 (D. Md. July 5, 2012) (stating that counsel must not advise a client to reject an offer based on the “manifestly erroneous” opinion that the client will not be convicted at trial).

Unreasonable advice during plea negotiations meets the defective performance prong of the *Strickland* standard. *Lafler*, 566 U.S. at 174. Advice based on a misunderstanding of the law is the quintessential example of such a deficiency. *United States v. Freeman*, 24 F.4th 320, 326 (4th Cir. 2022) (en banc). In *Dodson*, the defendant faced a potential life sentence for felony burglary and misdemeanor domestic battery, and he received an offer to plead guilty in exchange for a recommended sentence of two to eleven years. 800 F. App’x at 173. Counsel mistakenly believed that the burglary charge included a “breaking” element and advised the defendant to reject the plea because no breaking had occurred. *Id.* at 174-75. The Fourth Circuit found that this “deficient advice” and “lack of knowledge of the pertinent law” was a constitutionally defective performance. *Id.* at 180. Similarly, in *Lafler*, all parties conceded that counsel was deficient when the defendant’s lawyer told him that he could not be convicted of attempted murder because he had only shot the victim below the waist. 566 U.S. at 161, 163. And in *United States v. Swaby*, an attorney’s failure to realize that his client would be deported if he accepted a plea deal—a mistake that occurred because the attorney read an old version of the relevant statute—constituted ineffective representation. 855 F.3d 233, 240 (4th Cir. 2017).

Beyond explicit legal mistakes, an attorney’s inaccurate predictions can constitute defective performance if sufficiently unreasonable. *See United States v. Mayhew*, 995 F.3d 171, 177-78 (4th Cir. 2021); *Steele*, 321 F. Supp. 3d at 588-90. In *Mayhew*, a lawyer’s alleged assurances that the defendant would only receive a two-to-five-year sentence if he went to trial

breached the defendant's right to effective counsel when the defendant in fact received a sentence of twenty-six years and had faced a maximum sentence of even longer. 995 F.3d at 177-78. Likewise, in *Steele*, an attorney advised her client to reject an eight-to-ten-year plea deal in a drug conspiracy case because she unreasonably expected the success of a motion to suppress evidence and inaccurately believed that this issue could not be preserved for appeal if the client pled guilty. 321 F. Supp. 3d at 588-90. The District Court for the District of Maryland found that, "[Counsel] was overly confident in her ability to secure an acquittal . . . . She did not accurately manage her client's expectations, and she failed to remediate the obvious deficiencies in her familiarity with this jurisdiction and defense advocacy generally." *Id.* at 589. Further, though the client initially suggested he would only accept a plea for less than eight years, he eventually "begged his attorney to obtain a plea offer for him," which she failed to do. *Id.* at 592. The court found that "her failures to properly advise him throughout the critical pretrial stages, to adequately engage in the plea bargaining process, and to obtain a plea offer when her client pleaded for one" rendered her performance defective. *Id.* at 593.

In the present case, CLIENT's previous counsel provided advice that ranged from unrealistic to plainly incorrect. His legal strategy rested almost entirely on jury nullification, and his belief in the likely success of this approach stemmed partly from a mistake regarding state constitutional law. In a call in late February, about two weeks after CLIENT rejected a six-year plea, his then-attorney asserted that the Maryland Constitution gives the jury the power "to judge whether a law is just" and described this as "a real footing for the type of thing we're going to be doing at trial." *See* Call on 2/25/21. This is true in a sense: The Constitution of Maryland states that "the Jury shall be the Judges of Law, as well as of fact." Md. Const. Decl. of Rts. art. 23. However, a series of court cases beginning in the 1980 rejected the plain meaning of Article 23



and held that all but a few, limited legal questions “are for the judge alone to decide.” *Unger v. State*, 48 A.3d 242, 244-45 (Md. 2012) (citations omitted). Jury instructions based on Article 23—which had stated that the jury was the judge of the law and all other instructions were “advisory-only—were ultimately found unconstitutional. *Id.* at 417. Counsel’s understanding of the jury’s authority was therefore completely incorrect, a legal mistake of the kind and degree that made counsel’s performance defective in *Dodson* and *Swaby*. Though it is unclear to what extent this informed counsel’s strategy—he appears to have only mentioned it after CLIENT rejected the plea deal—the error exemplifies his professional incompetence regarding federal criminal defense and falls well outside the range of constitutionally permissible advice.

Moreover, apart from this misunderstanding of the law, CLIENT’s attorney provided unreasonable advice throughout the pretrial stage based on his unjustifiable belief that a jury would not convict CLIENT because of the popularity of marijuana legalization. Though CLIENT faced a ten-year mandatory minimum and maximum sentence of life in prison, his attorney even advised him that he would receive a better outcome by getting convicted at trial than accepting the government’s plea offer, which began at eight years and was eventually reduced to six. *See* Call on 10/13/20 (“It’s hard for me to see, even worst case scenario, them getting even near the eight they’re asking you to plea to.”); Call on 5/28/21 (“You’re not going to get 15 years. That’s not going to happen, just so you know.”). While he did say at times that the government’s final six-year offer was “good,” he also continued counseling CLIENT that likely changes to federal drug law and the probability of jury nullification made a trial the best option. *See* Calls from 12/29/21 to 2/16/22.

In some ways, this erratic advice is less obviously defective than counsel’s mistake regarding the jury’s legal authority. In other respects, however, this guidance is just as

egregiously incompetent. Despite understanding the elements of the charge, extent of the incriminating evidence, and CLIENT's sentence exposure, his attorney continued to baselessly insist that CLIENT would get the best results by going to trial. Like the attorney in *Steele*, whose absurd conviction in her ability to suppress key evidence led her client to reject a guilty plea, counsel's confidence in a favorable trial outcome was untethered from both fact and legal doctrine. That this opinion rested on the belief that he could convince a jury to not follow the law makes the strategy even more alarmingly deficient. If he at times vacillated and warned CLIENT that he risked a longer sentence at trial, *see* Call on 12/3/21, this contradictory advice only exacerbates his failure to provide the "competent . . . fully informed advice" about the merits of the plea deal, which the Constitution requires. *Burt*, 571 U.S. at 25 (Sotomayor, J., concurring). Though ineffective assistance claims have not previously been based on inconsistent advice, the absence of such cases further highlights counsel's blatant—and at times bizarre—incompetence in handling CLIENT's case. In short, CLIENT was deprived of the reasonable assistance guaranteed by the Sixth Amendment.

**B. CLIENT's testimony that he would have pled guilty if not for counsel's advice, his history of deferring to counsel, and the objective benefits of the plea demonstrate that he was prejudiced by counsel's deficient performance.**

The second prong of the *Strickland* standard requires the defendant to establish that the attorney's deficient performance prejudiced the outcome of the case. 466 U.S. at 687. This requires a "reasonable probability"—in other words, "a probability sufficient to undermine confidence in the outcome"—that the result of the proceedings would have been different but for counsel's errors. *Id.* at 694. In the context of a rejected plea deal, the defendant must demonstrate the reasonable probability that he would have entered a plea deal with less severe terms than the ultimate sentence. *Lafler*, 566 U.S. at 164. Additionally, the defendant must show that the

prosecution would not have withdrawn the offer, and the court would have accepted its terms. *Lafler*, 566 U.S. at 164; *Frye*, 566 U.S. at 147. However, informative statements by the court or government—for instance, the terms of a plea agreement itself—do not mitigate the prejudice of counsel’s deficiency unless the defendant actually understood the issue at hand. *United States v. Crawford*, No. GJH-15-322, 2021 WL 1662471, at \*9 (D. Md. Apr. 28, 2021).

A defendant can show that the prosecution and court would have followed through with the plea based on the “the boundaries of acceptable plea bargains and sentence” in the jurisdiction. *Frye*, 566 U.S. at 149. “[I]n most instances, it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain.” *Id.* For this reason, disputes over the prejudice prong usually hinge on whether the defendant would have otherwise accepted the plea. Evidence to this point includes a defendant’s own testimony, his previous statements expressing an interest in pleading guilty, a history of accepting plea deals, a history of following his attorney’s advice, and the general circumstances of the plea offer—for instance if it would have resulted in a far lower sentence. *See Cooper v. Lafler*, 376 F. App’x 563, 571-72 (6th Cir. 2010), vacated on other grounds, 556 U.S. 156 (2012); *Dodson*, 800 F. App’x at 180-81; *see also Swaby*, 955 F.3d at 243-44 (finding that defendant’s strong familial ties to the United States indicated that he would have rejected a guilty plea that resulted in his deportation had he been properly advised).

A defendant’s testimony can provide strong evidence of prejudice. In *Lafler*, the Supreme Court recognized that the defendant met the *Strickland* prejudiced prong based largely on the defendant’s uncontradicted testimony that he would have taken the plea if not for his lawyer’s incorrect advice about the possibility of a conviction at trial. 566 U.S. at 174. Additionally, his

lawyer confirmed he was open to a plea agreement, and the disparity between the rejected plea and his sentence exposure after trial further substantiated the defendant's testimony. *Id.* The government pointed to evidence that the defendant had wanted a plea deal with an even lesser sentence as indication that he would not have accepted the actual plea offer, but the court found that this actually corroborated his position by further indicating his desire to avoid a trial. *Id.* The court also rejected the government's argument that the defendant never expressed desire to plead guilty during pretrial conferences, concluding that this lack of interest stemmed from his counsel's incorrect advice. *Id.* Similarly, in *Dodson*, the defendant's testimony, history of accepting guilty pleas and generally relying on the advice of counsel, and the plea's objective benefits sufficed to establish prejudice. 800 F. App'x at 180-81. However, a defendant's testimony alone can be insufficient if his conduct does not suggest he would have accepted the plea. *See Merzbacher v. Shearin*, 706 F.3d 356, 366-67 (4th Cir. 2013) (finding that the state court was not unreasonable to conclude that the defendant's insistence on his innocence showed he would not have taken a guilty plea).

For CLIENT, his own testimony that he would have taken the plea but for counsel's advice provides substantial evidence of prejudice. This is corroborated by phone calls indicating that he was poised to take the plea until his attorney began reemphasizing the merits of going to trial. *See* Calls on 12/29/21, 2/11/21. Additionally, as in *Lafler* and *Dodson*, the disparity between the sentence offered in the plea—six years—and the sentence he now phases—ten years to life—substantiate this testimony; the fact that any rational person would have taken such a plea is itself evidence of prejudice. Further, like the defendant in *Dodson*, CLIENT has a history of following his counsel's advice. Upon deciding to reject the plea deal, he stated "I'm going into this completely on faith of my attorney." Call on 2/17/22. At counsel's suggestion, he hired a

series of public relations firms to publicize his case, part of counsel's misguided strategy to leverage the popularity of marijuana into a case dismissal or jury nullification. *See* Calls 5/12/21, 5/18/21. Moreover, this was against CLIENT's better judgement; he stated his frustration with "influencer" culture and worried it was a pointless tactic but changed his mind when counsel said it was best for his case—further indication of his deference to his counsel's advice. *See* Calls on 5/21/21, 5/24/21. Though CLIENT at times expressed antagonism to the idea of pleading guilty and cooperating with the government, this position is bound up with his attorney's near-daily statements that he would be heroic to go to trial and shine light on the injustice of marijuana criminalization. Like the defendant in *Lafner*, any disinterest CLIENT showed toward a plea deal was itself the result of counsel's deficiencies. In short, the evidence persuasively demonstrates that CLIENT would have accepted the plea but for his counsel's deficient performance.

The evidence also shows that the government would not have withdrawn the deal, and the court would have accepted it. CLIENT's many other co-defendants received similar plea offers, none of which were retracted by the government or rejected by the court. Further, the plea would have reasonably imposed a six-year sentence for a first-time, nonviolent drug offense. Due to CLIENT's safety-valve eligibility, this was well within the boundaries of acceptable plea agreements for such an offense. An objective assessment thus establishes that the government and court would have finalized the plea had CLIENT accepted it. This, together with the objective benefits of the plea deal, his history of following counsel's advice, and his corroborated testimony demonstrate that CLIENT was prejudiced by his counsel's deficient performance.

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**Writing Sample #2**

The following writing sample is a portion of an internal memorandum written for a summer internship with the Federal Public Defender for the District of Maryland. Our client was the former CEO of a nonprofit utility provider. He allegedly participated in a kick-back scheme with a subcontractor and was charged with bribery and related offenses under 18 U.S.C. § 666. The following memorandum excerpt analyzes (1) whether the statute requires intent to engage in a quid pro quo and (2) whether the client is a “public official” for purposes of sentencing enhancement under the U.S. Sentencing Guidelines. All identifying information is redacted. The work is entirely my own without any editing from others.

### Analysis

CLIENT allegedly violated 18 U.S.C. § 666, which applies when an agent of an organization that receives federal funding “corruptly solicits . . . or agrees to accept anything of value . . . intending to be influenced or rewarded in connection with any . . . transaction [worth at least \$5,000].” 18 U.S.C. § 666(a)(1)(B). In punishing corrupt conduct, criminal law has historically distinguished between bribes and illegal gratuities, with the former a more serious offense that requires intent to enter a quid pro quo arrangement. Stephanie G. VanHorn, *Taming the Beast: Why Courts Should Not Interpret 18 U.S.C. § 666 to Criminalize Gratuities*, 119 Penn St. L. Rev. 301, 302 (2014). As the Fourth Circuit Court of Appeals explained in *United States v. Jennings*, bribery requires that the defendant acted with the “‘corrupt intent’ . . . to receive a specific benefit in return for payment”—in other words, “to engage in ‘some more or less specific quid pro quo.’” 160 F.3d 1006, 1013 (4th Cir. 1998) (quoting *United States v. Duvall*, 846 F.2d 966, 972 (5th Cir. 1988)). An illegal gratuity, in contrast, “is a payment made to an official concerning a specific official act (or omission) that the payor expected to occur in any event”—more than “a good will gift” but less than a quid pro quo. *Id.* However, § 666 was enacted with broader language than the previous bribery statute, without an obvious distinction between bribes and illegal gratuities. *Id.* at 1019. Courts have divided on whether the quid pro quo requirement still applies, and the question is unresolved in the Fourth Circuit. *United States v. Vaughn*, 815 F. App’x 721, 728 (4th Cir. 2020).

**I. Circuits are split on whether 18 U.S.C. § 666 criminalizes gratuities in addition to bribes, and the Fourth Circuit has not decided the issue.**

Historically, illegal gratuities have been classified as a less serious offense than bribes due to the absence of a quid pro quo. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999). As the Supreme Court explained:

[F]or bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take . . . or for a past act that he has already taken. The punishments prescribed for the two offenses reflect their relative seriousness.

*Id.* However, the language of § 666—“intending to be *influenced or rewarded*”—does not explicitly make this distinction. 18 U.S.C. § 666(a)(1)(b) (emphasis added); *see* 18 U.S.C. 201(b)-(c) (distinguishing between bribes given “to influence” an official act, and gratuities given “for or because of” an official act). As of today, the Second, Seventh, and Eighth Circuits have found that § 666 extends to illegal gratuities, with no quid pro quo requirement. *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995); *United States v. Agostino*, 132 F.3d 1193, 1190 (7th Cir. 1997); *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007). The First Circuit, in contrast, applies § 666 only to bribes. *United States v. Fernandez*, 722 F.3d 1, 6 (1st Cir. 2013). In *Jennings*, the Fourth Circuit expressed concern about eliminating the bribery/gratuity distinction, but it has so far avoided resolving the matter. 160 F.3d at 1015; *see Vaughn*, 815 F. App’x at 728 (discussing the status of the bribery/gratuity distinction in the Fourth Circuit).

**a. Historically, an illegal gratuity given in the absence of a quid pro quo agreement was a less severe offense than bribery.**

Prior to the enacting of § 666 in 1984, an illegal gratuity was considered a lesser included offense in bribery under 18 U.S.C. § 201, the general bribery statute. *Jennings*, 160 F.3d at 1012, 1014. This reflects the principle that the “corrupt intent” required for bribery “is a ‘different and higher’ degree of criminal intent than that necessary for an illegal gratuity,” where the payment relates to conduct the recipient was expected to perform no matter what. *Id.* at 104 (quoting *United States v. Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974)). For this reason, § 201 expressly distinguishes between a bribe “corruptly” accepted “in return for . . . being influenced,”



punishable by up to fifteen years in prison, and a gratuity accepted “for or because of any official act,” punishable by up to two years in prison. 18 U.S.C § 201(b)(2), (c)(3).

In contrast, § 666 applies when an individual “corruptly” accepts payment while “intending to be influenced *or rewarded*.” *Id.* § 666(a)(1)(B) (emphasis added). In other words, § 666 adopts the corrupt intent element of the § 201 bribery provision but extends it to situations where the recipient was “rewarded” rather than “influenced,” making the statute’s application to gratuities unclear. To exacerbate this ambiguity, the original version of the statute, enacted in 1984, criminalized gifts made “for or because of the recipients conduct,” an even broader category of intent. Pub. L. No. 98-473, § 1104(c), 98 Stat. 1837, 2144 (1984). In dicta, the Fourth Circuit suggested that the current statutory language could have been adopted to intentionally limit § 666 to bribes, though other courts have rejected this interpretation. *See Jennings*, 160 F.3d at 1016 n.4 (“[A] court interpreting the statutory history of the 1986 amendment to § 666 could reach the conclusion . . . that the 1986 amendment to § 666 clarified that the statute prohibited only bribes.”). *But see Bonito*, 57 F.3d at 171 (“Fatal to [defendant’s] argument [that the updated statute prohibits only bribes], however, is the fact that the deleted language has been replaced with language that is to the same effect.”).

**b. The Fourth Circuit has not decided whether § 666 requires intent to engage in a quid pro quo.**

The Fourth Circuit has twice declined to rule on the application of § 666 but has suggested that a quid pro quo element should apply. *Jennings*, 160 F.3d at 105; *Vaughn*, 815 F. App’x at 728. In *Jennings*, the defendant, a contractor who made illegal payments to a housing authority contractor, argued that the payments were gratuities rather than bribes and not prohibited under the statute. 160 F.3d at 1010-12. The court ultimately found that the payments were bribes, so it did not address the interpretation of § 666. *Id.* at 1015. However, the court

suggested that including gratuities within the statute would problematically “blur longstanding distinction between bribes and illegal gratuities.” *Id.* at 1015 n.4. In a long footnote, the court criticized other circuits’ decision to extend § 666 to gratuities and offered two potential justifications for excluding them. *Id.* First, a court could reasonably determine that “corruptly . . . with intent to influence or reward” resembles § 201’s bribery provision, not the gratuity provision. *Id.* “Second, a court interpreting the statutory history of the 1986 amendment to § 666 could reach the conclusion . . . that the 1986 amendment to § 666 clarified that the statute prohibits only bribes.” *Id.* Because the issue was unnecessary for the case’s resolution the court “[le]ft] the definitive interpretation . . . for another day.” *Id.*

Two decades later, in *Vaughn*, the Fourth Circuit again deferred the question. 815 F. App’x at 728. Vaughn was a Maryland State Delegate who helped pass legislation permitting Sunday liquor sales in exchange for payments from liquor store owners. *Id.* at 723-26. He argued that the payments were gratuities rather than bribes because he would have voted for the bills regardless. *Id.* at 729. However, evidence indicated that even if he would have voted for “*some kind of [Sunday sales] legislation,*” the payments still influenced the specific policies he supported. *Id.* (alteration in original). Again, because the evidence supported a bribery conviction, the court did not decide the gratuities issue, though it observed that most circuits apply § 666 to gratuities, with only the First Circuit limiting it to bribes. *Id.* Unlike in *Jennings*, the court did discuss other circuits’ reasoning at length, but it noted, “A third possibility is that § 666 criminalizes bribery along with something less than bribery, but greater than a gratuity as defined under § 201.” *Id.* This arguably suggests the Fourth Circuit remains open to limiting § 666, though the reasoning here further blurs the line between bribes and gratuities.

**c. Only the First Circuit has found that § 666 applies exclusively to bribes.**

The First Circuit alone has determined that § 666 does not include gratuities. *Fernandez*, 722 F.3d at 6. In *Fernandez*, the trial court instructed the jury that conviction under § 666 required the government to prove the existence of a quid pro quo, but it also instructed that the offer could take place *after* the conduct being rewarded. *Id.* at 17-18. On appeal, the defendants argued that an offer of a reward made after the conduct is a gratuity, not a bribe, and therefore not covered by the statute. *Id.* at 18-19. The First Circuit agreed. First, it determined that bribery occurs only if the offer is made beforehand, though payment itself can occur after the conduct. *Id.* at 20. Second, the court found that § 666 applies only to bribes, a conclusion based on the statute's use of "corruptly," its relationship with § 201, and the historically disparate penalties for bribes and illegal gratuities. *Id.* at 20-26. While most circuits have held that a gratuity falls within the provision as a "reward," the court explained that "the word 'reward' does not create a separate gratuity offense in § 666, but rather . . . merely clarifies 'that a bribe can be promised before but paid after, the official's action on the payor's behalf.'" *Id.* at 23 (citing *Jennings*, 160 F.3d at 1015 n.3). *Fernandez*'s analysis is far more extensive than that of cases from other circuits and provides a strong persuasive precedent for limiting the statute to bribes.

**d. The Second, Eighth, and arguably Seventh extend § 666 to illegal gratuities.**

The Second, Seventh, and Eighth Circuits have rejected a quid pro quo requirement and found that § 666 criminalizes both bribes and illegal gratuities. In *United States v. Crozier*, the Second Circuit Court of Appeals pointed to the "broad language" of an earlier version of § 666, which criminalized the offer of "anything of value *for or because of the recipient's conduct*," to justify including "both past acts supporting a gratuity theory and future acts necessary for a bribery theory." 987 F.2d 893, 898-99 (2d Cir. 1993). *Bonito*, a Second Circuit case concerning the current version of § 666, echoed this reasoning in concluding that payment "to influence or

reward” official conduct covers gratuities given with the intent to reward, “so long as the intent to reward is corrupt.” 57 F.3d at 171. Likewise, in *Zimmerman*, the Eighth Circuit Court of Appeals rejected the defendant’s argument that conviction required a quid pro quo, reasoning that “intending to be influenced or rewarded” means that the law applies both to “bribes and the acceptance of gratuities intended to be a bonus for taking official action.” 509 F.3d at 927.

The Seventh Circuit has also rejected a quid pro quo element, though its case law is somewhat ambiguous. In *Agostino*, the court found that the government did not need to show a quid pro quo agreement when charging an individual based on the *offer* of a payment. 132 F.3d at 1190. However, the earlier case *United States v. Medley* potentially recognized a quid pro quo element when an individual was charged with *receiving* an illegal payment. 913 F.2d 1248, 1260-61 (7th Cir. 1990). In considering an appeal based on erroneous jury instructions—ultimately rejected—the court stated, “The essential element of a § 666 violation is a ‘quid pro quo’; that is, whether the payment was accepted to influence and reward an official for an improper act.” *Id.* at 1260. Confusingly, though, the court also remarked that bribes and gratuities “are both illegal under different parts of the statute,” seeming to distinguish between them based on something other than the quid pro quo element. *Id.* Considering this language, the *Agostino* court stated that *Medley* “was not positing an additional element to the statutory definition of the crime, but instead was explaining the *sine qua non* of a violation of § 666.” 132 F.3d at 1190. Because of this, and the fact that *Medley* concerned receiving rather than giving a bribe, *Agostino* “decline[d] to import an additional, specific *quid pro quo* requirement into the elements of § 666(a)(2).” *Id.*

**II. “Public official” includes individuals in positions of public trust with responsibility for carrying out government policies and programs.**

The United States Sentencing Guidelines enhance the sentence of individuals convicted under 18 U.S.C. § 666 “if the defendant was a public official.” U.S. SENT’G GUIDELINES MANUAL § 2C1.1(A). The Guidelines state that “public official” is to be broadly construed and includes “[a]n individual who . . . (i) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions.” *Id.* § 2C1.1(A) cmt. n.1.

Given this intentionally broad construction of “public official,” the above category likely applies to CLIENT. COMPANY, a 501(c)(12) nonprofit, was created by the Maryland General Assembly and is funded largely by the state and federal government, suggesting that CLIENT was “in a position of public trust with official responsibility for carrying out a government program or policy.” *Id.* Further, courts have generally been unreceptive to defendants’ assertions that they are not public officials, even in ambiguous circumstances. *See, e.g., United States v. ReBrook*, 58 F.3d 961, 969-70 (4th Cir. 1995) (finding that the attorney for the West Virginia Lottery Commission was an “official holding a high level decision-making or sensitive position); *United States v. Hernandez*, No. 20-50012, 2021 WL 3579386 (9th Cir. Aug. 13, 2021) (finding that an employee of Fannie Mae, a private company under a government conservatorship, was a public official).

CLIENT could likely be a public official based exclusively on the Navy contract, though this is less clear, and no case law speaks directly to this issue. In *United States v. Dodd*, a guard at a private prison that housed federal inmates conceded that he was a “public official” but unsuccessfully disputed that he held a high-level decision-making position. 770 F.3d 306, 308 (4th Cir. 2014). Though a very different context, this arguably suggests that an employee of an

organization involved in the execution of a contract with the government can be a public official.

Somewhat similarly, in *United States v. Robinson*, the defendant unsuccessfully appealed a conviction for fraudulently billing the Newark Watershed Conservation Development Corporation (“NWCDC”) because NWCDC’s status as a private organization negated the “public official” element of her charges. No. 21-1114, 2022 WL 186047, at \*1 (3d Cir. Jan. 20, 2022). The court determined that NWCDC was effectively a public actor based on a New Jersey law that a non-profit in a contract with the city related to water supply “exercise[d] the powers and responsibilities of the city.” *Id.* Maryland does not appear to have any analogous statutes for utility providers, but the government has a strong argument that the nature of contract between COMPANY and the Navy meant that CLIENT was “in a position of public trust with official responsibility for carrying out a government program or policy.”

**Applicant Details**

First Name	<b>P.J.</b>
Last Name	<b>Austin</b>
Citizenship Status	<b>U. S. Citizen</b>
Email Address	<a href="mailto:p.j.austin@duke.edu">p.j.austin@duke.edu</a>
Address	<div> <b>Address</b>  <b>Street</b>  <b>2711 E Shoreham St</b>  <b>City</b>  <b>Durham</b>  <b>State/Territory</b>  <b>North Carolina</b>  <b>Zip</b>  <b>27707-2959</b>  <b>Country</b>  <b>United States</b> </div>
Contact Phone Number	<b>5627283126</b>

**Applicant Education**

BA/BS From	<b>University of California-Santa Barbara</b>
Date of BA/BS	<b>December 2018</b>
JD/LLB From	<b>Duke University School of Law</b>
	<a href="https://law.duke.edu/career/">https://law.duke.edu/career/</a>
Date of JD/LLB	<b>May 7, 2023</b>
Class Rank	<b>School does not rank</b>
Law Review/Journal	<b>Yes</b>
Journal(s)	<b>Duke Law Journal</b>
Moot Court Experience	<b>Yes</b>
Moot Court Name(s)	<b>Moot Court</b>

**Bar Admission****Prior Judicial Experience**

Judicial Internships/ Externships	<b>Yes</b>
--------------------------------------	------------

Post-graduate Judicial Law Clerk      **No**

### **Specialized Work Experience**

### **Recommenders**

Richman, Barak D.  
richman@law.duke.edu  
919-613-7244

Hall, Jason  
jhall@cahill.com

Siegel, Neil S.  
Siegel@law.duke.edu  
919-613-7157

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**



**P.J. Austin**

2711 East Shoreham St. | Durham, NC 27707  
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May 28, 2023

The Honorable Jamar K. Walker  
 United States District Court for the Eastern District of Virginia  
 600 Granby Street  
 Norfolk, VA 23510

Dear Judge Campbell,

I am writing to apply for a clerkship in your chambers for the 2024–2025 term. I am a recent graduate of Duke University School of Law. This fall, I will be a first-year associate in Cahill Gordon & Reindel’s New York office.

I believe I have the research and writing skills to excel as your clerk. While at Duke Law, I have enhanced my legal skills by competing in moot court competitions, participating in Duke’s Appellate Practice course, and working as a research editor for the Duke Law Journal. Last spring, I coauthored an essay about Black farmers, entitled *Rattlesnakes, Debt, and ARPA § 1005: The Existential Crisis of American Black Farmers*, which the Duke Law Journal Online published. During the summer of 2021, I interned for Judge Mary Ellen Coster Williams of the Court of Federal Claims in Washington, DC. In this role, I worked closely with the judge and her clerks and saw firsthand the importance of thorough research, clear writing, and collaboration.

Letters of recommendation on my behalf can be sent by Duke from the following individuals:

Professor Neil Siegel  
 Duke Law School  
 (919) 613- 7157  
 siegel@law.duke.edu

Professor Barak Richman  
 Duke Law School  
 (919) 613-7244  
 richman@law.duke.edu

Jason Hall  
 Cahill Gordon & Reindel LLP  
 (212) 701-3154  
 jhall@cahill.com

Please let me know if I can provide any other information that would be helpful. Thank you for your time and consideration.

Sincerely,

P.J. Austin

2711 East Shoreham Street  
Durham, NC 27707

**P. J. AUSTIN**  
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## EDUCATION

### **Duke University School of Law, Durham, NC**

*Juris Doctor*, May 2023

GPA: 3.27

*Honors:* Duke Law Journal, *Research Editor*  
Moot Court, *Board Member*

*Activities:* Black Law Students Association, *Director of Programming*

### **University of California, Santa Barbara, Santa Barbara, CA**

Bachelor of Arts in Political Science, *with Distinction*, December 2018

GPA: 3.47

*Honors:* Political Science Honors Program; Gilman Scholar; Dean's Honors

*Thesis:* *Hobbes's Theory of Obligation Reinterpreted: A Resolution to Apparent Discrepancies*

*Study Abroad:* Exeter College, Oxford University, United Kingdom, Summer 2018

*Activities:* Pi Sigma Alpha – National Political Science Honor Society

## EXPERIENCE

### **Professor Barak Richman, Durham, CA**

*Research Assistant*, May 2023 – Present

- Conducted research regarding health care market consolidation and concentration in California.

### **First Amendment Clinic, Duke Law Clinics, Durham, CA**

*Legal Intern*, January 2023 – April 2023

- Drafted a complaint and motions for litigation regarding defamation and Section 1983.
- Conducted research regarding defamation, public records, statute of limitations, and content moderation.

### **Cahill Gordon & Reindel, New York, NY**

*Summer Associate*, May 2022 – July 2022

- Conducted research and drafted memos on a variety of issues, including aiding and abetting, securities fraud, and class decertification.
- Drafted motion in limine for upcoming antitrust trial.

### **The Honorable Mary Ellen Coster Williams, U.S. Court of Federal Claims, Washington, DC**

*Judicial Intern*, June 2021 – July 2021

- Researched legal issues to assist the judge with her review of cases; researched topics such as categorical takings and the validity and enforcement of government contracts.
- Drafted memos summarizing legal findings for efficient review and use by the judge.
- Participated in conferences with the judge and her law clerks on a regular basis to discuss ongoing matters, projects, and needs.

## PUBLICATION

Maia Foster & P.J. Austin, *Rattlesnakes, Debt, and ARPA § 1005: The Existential Crisis of American Black Farmers*, 71 DUKE L.J. ONLINE 159 (2022).

## ADDITIONAL INFORMATION

*Interests:* Guitar, Bass, Painting

*Other:* Dual citizenship (U.S. and Canada), First Generation College and Graduate Student

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## UNOFFICIAL TRANSCRIPT DUKE UNIVERSITY SCHOOL OF LAW

### 2020 FALL TERM

<u>COURSE TITLE</u>	<u>PROFESSOR</u>	<u>GRADE</u>	<u>CREDITS</u>
Civil Procedure	Miller, D.	3.3	4.50
Contracts	Richman, B.	3.4	4.50
Criminal Law	Coleman, J.	3.0	4.50
Legal Analysis, Research, Writing	Strauss, E.	<i>Credit Only</i>	0.00
Professional Development	Multiple	<i>Credit Only</i>	1.00

### 2021 SPRING TERM

<u>COURSE TITLE</u>	<u>PROFESSOR</u>	<u>GRADE</u>	<u>CREDITS</u>
Constitutional Law	Young, E.	2.8	4.50
Torts	Frakes, M.	2.9	4.50
Property	Wiener, J.	3.1	4.50
Legal Analysis, Research, Writing	Strauss, E.	3.2	4.00
Counselor and Client	Buell, E.	<i>Credit Only</i>	1.00

### 2021 FALL TERM

<u>COURSE TITLE</u>	<u>PROFESSOR</u>	<u>GRADE</u>	<u>CREDITS</u>
Ethics/Law of Lawyering	Richardson, A.	3.2	2.00
Corporate Crime	Buell, S.	3.3	4.00
Appellate Practice	Andrussier, S.	3.3	3.00
Negotiation	Thomson, C.	3.5	3.00

### 2022 SPRING TERM

<u>COURSE TITLE</u>	<u>PROFESSOR</u>	<u>GRADE</u>	<u>CREDITS</u>
Art Law	DeMott, D.	3.3	2.00
Appellate Courts	Levy, M.	3.3	2.00
Federal Courts	Siegel, N.	3.1	4.00
Legislative and Statutory Interpretation	Lemos, M.	3.4	3.00

Structuring and Regulating Financial Transactions	Schwarcz, S.	3.8	3.00
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**2022 FALL TERM**

<u>COURSE TITLE</u>	<u>PROFESSOR</u>	<u>GRADE</u>	<u>CREDITS</u>
Evidence	Beskind, D.	3.4	4.00
First Amendment	Benjamin, S.	3.2	3.00
Scholarly Writing Workshop	Thorn, A.	3.4	3.00
Readings (Transgender Issues)	Simmons, A.	CR	1.00
Law & Literature: Race & Gender	Jones, T.	3.5	3.00

**2023 SPRING TERM**

<u>COURSE TITLE</u>	<u>PROFESSOR</u>	<u>GRADE</u>	<u>CREDITS</u>
Bankruptcy & Corporate Reorganization	Schwarcz, S.	3.4	2.00
Civil Rights Litigation	Miller, D.	3.3	3.00
First Amendment Clinic	Ludington, S. Martin, A.	3.4	4.00
Jury Decision Making	Bornstein, B.	3.4	2.00
Collective Action Constitution	Siegel, N.	3.5	3.00
Readings (The Administrative State)	Mishchenko, L.	<i>Credit Only</i>	1.00

TOTAL CREDITS:	87.00
CUMULATIVE GPA:	3.27

Duke University School of Law  
210 Science Drive  
Durham, NC 27708

May 31, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Re: P.J. Austin

Dear Judge Walker:

I write to recommend P.J. Austin for a clerkship in your chambers. P.J. was a student in my Fall 2020 Contracts class, and we have since remained in frequent contact. I think he'd be a terrific clerk.

The pandemic made the Fall of 2020 a hard semester for everyone, especially 1Ls, but I was impressed by how resilient and adaptive our class was. P.J. was among those who actively made the most of a difficult situation. In both comments in class and in discussions during office hours, P.J. was actively engaged with the material, and put in enormous time into mastering the material. Despite the virtual setting, I felt like I grew to know him well, and I enjoyed discussing the themes of the class—and law school more generally—during his frequent office hour visits. He worked immensely hard throughout the semester, and I was not surprised that he earned an above-median grade in what was a very talented class.

P.J. is also immensely well-liked by his classmates and the faculty. I noticed during the Fall 2020 semester that he seemed to manage the challenges of isolation well, both seeking out the help he needed for the course and collaborating with classmates to help build the student community. He developed many friends throughout his first year of law school, and I credit students like him for facilitating our school's smooth reintegration to in-person classes. I genuinely enjoy his company, and I've appreciated the additional opportunities I've had to share a meal with him outside of law school regular hours.

I'm confident that P.J. would be a terrific clerk, and I'm delighted that he wants to be one. Too many of our students are preoccupied with starting at a firm, without realizing the richness of the clerkship experience or valuing the public service it entails. P.J. does, and he's clerking for the right reasons. His grades are not as high as our typical clerkship applicant, but that reflects neither the value he'll provide to your chambers nor the benefits he'll accrue from your mentorship. He will be a diligent worker and a terrific team player. He'll invest care and thoroughness into the job, and he'll take pride in the chamber's work.

In short, I hope you consider P.J. for a clerkship. Please feel free to contact me should you wish to discuss his application any further.

Sincerely yours,

Barak D. Richman  
Edgar P. and Elizabeth C. Bartlett Professor of Law  
Professor of Business Administration

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WESTERN AUSTRALIA ONLY  
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ONLY

(212) 701-3154

April 25, 2023

Re: Application of P.J. Austin

Dear Judge:

It is my pleasure to provide this letter of recommendation for P.J. Austin as he seeks a role as a judicial clerk in Your Honor's chambers. I served as P.J.'s mentor partner during his time at Cahill last summer, and in that capacity I worked closely with him as we prepared for a jury trial. I have supervised hundreds of associates and summer associates over the years and found P.J. to be one of the best. I recommend him without hesitation.

During P.J.'s time at Cahill, we were in the final stage of trial preparation in a long-running antitrust class action. P.J. quickly became an important member of the team, and I found his work to be extremely impressive.

Among several projects, P.J. got up to speed on complex evidentiary issues and conducted research to support one of our key *in limine* motions relating to subsequent remedial measures. With only minimal guidance and direction, P.J. was able to identify the strongest points and supporting authorities. He designed the argument that ultimately prevailed when the motion was filed. He wrote a polished first draft of the brief that demonstrated his ability to deliver quality work on a tight deadline.

P.J. was undaunted by the massive evidentiary record and long procedural history in the case; he found ways to contribute meaningfully from his first week. He effectively brought to bear his prior experience as a judicial intern, and his insights from case law research, to help us prioritize and reframe legal arguments.

His intellectual curiosity helped us look at familiar problems from a new perspective. He asked insightful questions and seemed genuinely interested in complex legal



CAHILL GORDON & REINDEL LLP

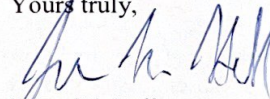
-2-

issues. More than that, P.J. brought his fresh perspective to our evaluation of the facts and witnesses. As a first generation law student, P.J. was able to look past the "lawyering" to help us evaluate witness testimony that would be powerful with the jury. P.J. impressed me and other members of the team with his intuitive ability to leverage insights from his varied experiences and prior work for our client's benefit.

On a personal level, it was truly a pleasure to have P.J. on our team. He brought tremendous enthusiasm, energy, and a strong work ethic that proved critical as we juggled competing priorities in the lead-up to trial. He looked proactively for ways to contribute and make himself helpful to the effort. He has the rare ability to know when to observe and when to speak up. Those skills served him well at Cahill, as they will serve him well in a busy judicial chambers.

My partners and I were consistently impressed with P.J. and his contributions. I am confident he will be an asset to Your Honor's chambers if he has an opportunity to serve as your law clerk. P.J. has my full and unequivocal recommendation. I would be pleased to answer any questions Your Honor may have.

Yours truly,

A handwritten signature in blue ink, appearing to read "Jason M. Hall", is written over the typed name.

Jason M. Hall

Duke University School of Law  
210 Science Drive  
Durham, NC 27708

May 31, 2023

The Honorable Jamar Walker  
Walter E. Hoffman United States Courthouse  
600 Granby Street  
Norfolk, VA 23510-1915

Re: P.J. Austin

Dear Judge Walker:

I am pleased to recommend P.J. Austin for a clerkship in your chambers. P.J. was a successful student in my Federal Courts class this past spring, and I was sufficiently impressed by him that I agreed to advise his law review note this past fall. I am confident that he will succeed as a law clerk and lawyer.

I regard Federal Courts as one of the most difficult classes that the Law School offers—and as essential for clerking and litigating. Many Duke Law students shy away from the class because of its frightening reputation and potentially negative impact on their GPAs. My course covers challenging subjects: *Marbury* as a federal courts case; congressional control of federal-court jurisdiction; the different justiciability doctrines; the ins and outs of state sovereign immunity; Section 1983 litigation and individual officer immunity; the several abstention doctrines; U.S. Supreme Court review of state-court judgments; and federal habeas-corpus review of state-court criminal convictions and sentences.

P.J. worked extraordinarily hard in the course. He was prepared when I called on him, and he occasionally volunteered to try to tackle my tough questions to the class. Outside of class, he participated actively during office hours by asking about course materials or current legal events such as Texas Senate Bill 8 or the constitutionality of expanding the U.S. Supreme Court. Indeed, he was the student in the class who most effectively critiqued—and thereby helped sharpen—the constitutional arguments I make in a forthcoming law review article on packing the U.S. Supreme Court. I really enjoyed having lunch with several of his classmates and him toward the end of the semester.

I fully expect that P.J. will fit in well in the close confines of chambers. He is calm, hard-working, mature, respectful, resilient, unassuming, and well-liked by his professors and peers. He is an absolute pleasure to be around. Unsurprisingly, he received a return offer from his law firm immediately upon completing its summer associate program.

I was recently appointed the Associate Dean for Intellectual Life at the Law School, so this year I have even less time than usual to take on additional responsibilities. Even so, I could not resist saying yes when P.J. asked if I would advise his law review note this past fall. He is just so hard-working and likeable, and he cares about legal and policy questions that matter. He will also add critically needed diversity to the legal profession, including to the group of law clerks that our nation's law schools produce each year.

Please feel free to contact me if I can be of additional help as you consider P.J.'s application. I would be pleased to speak with you about him.

Sincerely yours,

Neil S. Siegel  
David W. Ichel Professor of Law and Political Science  
Associate Dean for Intellectual Life  
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WRITING SAMPLE

The attached writing sample is a memorandum that I wrote for my judicial internship with Judge Mary Ellen Coster Williams in the summer of 2021. In the memo, I was asked to address whether the plaintiff's torts claims were barred by the statute of limitations. No other person aided in the preparation of this memorandum. The party names and locations have been altered for confidentiality.

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**MEMORANDUM**

**TO:** Senior Judge Mary Ellen Coster Williams  
**FROM:** P.J. Austin  
**CC:** Alex Prime  
**DATE:** July 28, 2021  
**RE:** Are QC's tort claims barred by the statute of limitations?

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Question Presented

Are QC's tort claims barred by the statute of limitations?

Brief Answer

Likely not. Generally, the statute of limitations period in Massachusetts is three years for tort claims. However, Massachusetts courts have adopted a discovery rule which provides that the state of limitation begins to run when a plaintiff knows or reasonably should know that she may have been harmed by a defendant's conduct. Alternatively, courts do not enforce the statute of limitations where the statements lulled the plaintiff into the false belief that it was not necessary for him to commence action within the statutory period of limitations. Here, QC did not discover RED's involvement in drafting the request for proposals ("RFPs") until 2016. Further, RED and ABC Agency appeared to work in tandem to reassure QC that it would be made whole by equitable adjustment. Therefore, QC torts claims were equitably tolled and fall within the statute of limitations period.

Facts

Plaintiff QUALITY CONSTRUCTION ("QC") brought action against Defendant RED International Inc. ("RED") for tort claims in relation to a contract between QC and the United States ABC Agency ("ABC"). Compl. Against RED Int'l Inc. ("D.C. Comp.") at 1, ECF No. 1.

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In late 2014, QC entered into the Schools Contract and the Clinic Contract (“Contracts”) with ABC Agency to prepare final designs for the rebuilding of multiple schools and a health clinic in Costa Rica after Tropical Storm Sarah. *Id.* at 10–11. In accordance with a prior contract between RED and ABC Agency, RED was to be the Architectural Engineer (“A/E”) for the Contracts’ projects. *Id.* at 5.

Now, QC alleges RED conducted itself in a way that warrants tortious liability. QC submits claims of tortious interference, misrepresentation, civil conspiracy (coercive and concerted action), and unjust enrichment. *Id.* at 37–41. The alleged tortious behavior began with RED’s part in drafting amendments to the Schools RFPs in 2014, which QC alleges were misrepresented and induced their bid. QC’s Mem. in Opp’n. to Def. RED Int. Inc.’s Mot. Summ. J. (“QC’s Resp. to MSJ”) at 17, ECF No. 92; Resp. of Pl. QC to Rev. Stmt. Mat. Facts in Supp. of Def. RED Int. Inc.’s Mot. Summ. J. (“QC’s Resp. to SMF”) at 35, ECF No. 93. The amendments to the RFPs stated that all ancillary permits and property titles would be provided and presented no legal issues. QC’s Resp. to MSJ at 17, ECF No. 92.

However, all permits were not provided and the property titles did have legal issues. *Id.* QC claims it was not aware that RED had participated in drafting the amendments to the RFPs until it received information through the Freedom of Information Act (“FOIA”) requests. QC’s Resp. to SMF at 18, ECF No. 93. Therefore, QC is arguing that it was unaware that RED was partially responsible for the alleged harm and the statute of limitations period should begin when QC discovered that information through the FOIA requests. QC’s Resp. to MSJ at 11, ECF No. 92.

Further, during QC’s performance of the Contracts, QC claims that it was continuous impeded by RED. QC alleges RED intentionally submitted defective preliminary designs and

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used its role as A/E to deflect blame and costs onto QC. Mem. and Order (“Saris’ Order”) at 5, ECF No. 30. QC initially sought remedy through administrative procedures by filing requests for equitable adjustments. QC’s Resp. to MSJ at 6, ECF No. 92. QC alleges that it believed it may have been made whole from the adjustments based on representations from RED and ABC Agency and therefore, postponed filing suit to against them. QC’s Resp. to MSJ at 6, ECF No. 92. In response to QC’s requests for equitable adjustment, the Contracting Officer (“CO”) issued his final decisions on October 15, 2018. QC was not satisfied with the CO’s judgment and filed suit on November 9, 2018 against RED and ABC Agency. *Id.*

#### Discussion

Generally, the statute of limitations period in Massachusetts is three years for tort claims. Mass. Gen. Laws ch. 260, § 2A; *RTR Tech., Inc. v. Helming*, 707 F.3d 84, 89 (1st Cir. 2013). Usually, a plaintiff’s cause of action begins accrues at the time of his injury. *Id.* However, Massachusetts courts have adopted a discovery rule which provides that “a cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or reasonably should know that she may have been harmed by a defendant’s conduct, even if the harm actually occurred earlier.” *Id.*; *See also Keane, Inc. v. Swenson*, 81 F.Supp.2d 250, 255 (D. Mass. 2000).

The discovery rule only applies to plaintiff’s injuries that were “inherently unknowable.” *RTR Tech.*, 707 F.3d at 90. A “plaintiff need not know the extent of the injury or know that the defendant was negligent for the cause of action to accrue.” *Id.* (quoting *Williams v. Ely*, 423 Mass. 467 (1996)). Plaintiff need only know that he sustained an appreciable harm as a result of the defendant’s conduct. *Id.* Factual disputes regarding when the plaintiff knew or should have known are typically submitted to a factfinder, unless admitted or undisputed facts allow a

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determination as a matter of law. *Salois v. Dime Sav. Bank of New York, FSB*, 128 F.3d 20, 26 (1st Cir. 1997).

Additionally, when a plaintiff fails to bring timely claims based reasonable reliance on representations by defendant regarding a settlement, courts do not enforce the statute of limitations where the representations “lulled the plaintiff into the false belief that it was not necessary for him to commence action within the statutory period of limitations.” *Deisenroth v. Numonics Corp.*, 997 F.Supp. 153, 157 (D. Mass. 1998) (Saris opinion) (internal quotations omitted). Under the Contracts Dispute Act, a plaintiff is required to “exhaust available administrative remedies by first submitting a ‘claim’<sup>1</sup> to and obtaining a ‘final decision’ from the contracting officer.” *Sarang*, 76 Fed.Cl. at 564 (citing 41 U.S.C. § 605(a)). Courts have recognized that a plaintiff may be entitled to equitable tolling of the statute of limitations while its exhausting administrative remedies. *Dillon v. Dickhaut*, 2013 WL 2304175, at \*4 (D. Mass. May 24, 2013). *Contra Holloman v. Clarke*, 208 F.Supp.3d 373, 378 (D. Mass. 2016) (noting the First Circuit has not “determined whether federal or state equitable tolling principles apply”).

This memorandum will begin by addressing the application of the First Circuit’s statute of limitations doctrine to (1) the RFP amendments. Then, the memorandum will address the

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<sup>1</sup> “Claim” is undefined by the CDA. *See Sarang Corp. v. United States*, 76 Fed.Cl. 560, 564 (2007) (citing 41 U.S.C. § 605(a)). The term is defined in the Federal Acquisition Regulations as “a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.” 48 C.F.R. § 52.233–1(c).

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application of the doctrine to (2) the remaining claims and whether there is a possibility that the claims will be equitably tolled.

- I. Here, a reasonable jury will likely hold that its claims regarding the misrepresentations in the RFP amendments were equitably tolled per the discovery rule.

QC alleges it became aware of its alleged injury regarding the misrepresentations in the amended RFPs within months of signing the Contracts in 2014. QC's Resp. to MSJ at 11, ECF No. 92. Therefore, the time of QC's injury would fall outside of the statute of limitation's three-year period because it occurred before November 9, 2015 (3 years before the current action commenced on November 9, 2018). *See RTR Tech.*, 707 F.3d at 89.

However, QC correctly alleges that period is tolled by the discovery rule. *See Puritan Med. Ctr. v. Cashman*, 413 Mass. 167, 175 (1992). The question of whether QC exercised reasonable diligence and should have known RED's partial role in drafting the RFPs amendments is not so clear cut as to permit a determination as a matter of law. *See Salois*, 128 F.3d at 26. Unlike the plaintiff in *Salois*, the documents provided to QC did not contain the relevant information. *See id.*

Still, RED could argue that QC's should have exercised diligence by inquiring into RED's involvement at the time since it was notifying ABC Agency of defects in the preliminary designs provided by RED. However, if the question is submitted to a factfinder, he could find it was "inherently unknowable" that RED helped draft the amendments to the RFP given the information provided to QC at the time of the injury. *See id.* Therefore, a reasonable jury could find that QC's misrepresentation claims regarding the amendments to the RFPs are timely because the limitations period is tolled until 2016 when QC discovered RED's role in drafting the statements. *See RTR Tech.*, 707 F.3d at 89.

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II. Regarding the remaining claims, a reasonable jury will likely find that QC's tort claims are equitably tolled until the CO issued its final decision on October 15, 2018.

Here, a reasonable jury will likely find that QC's remaining tort claims are equitably tolled until the CO issued its final decision on October 15, 2018. The parties argue alternate timelines regarding when QC allegedly suffered appreciable harm sufficient to trigger the statute of limitations period.<sup>2</sup> Rev. Mem. in Supp. of Def. RED Int. Inc.'s Mot. Summ. J. ("RED's MSJ") at 20, ECF No. 86; QC's Resp. to MSJ at 15, ECF No. 92. Accordingly, despite RED's contention that the issue is clearly in their favor, there is a factual dispute regarding when QC suffered its alleged appreciable harm.

In relation to all its claims, QC provides a few examples of case law where it was debatable whether there was sufficient evidence to show the plaintiff knew or should have known it suffered appreciable harm at the time of the alleged tort. QC's Resp. to MSJ at 6, ECF No. 92. QC argues that it is possible that it may have been "made whole" and not have suffered appreciable harm because of equitable adjustments to the contract. QC's Resp. to MSJ at 6, ECF No. 92. Therefore, it argues harm the injury did not accrue until a final decision was made by the CO. QC's Resp. to MSJ at 6, ECF No. 92. However, utilizing the reasoning within two cases QC cites to prove this argument, the potential for equitable adjustments does not

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<sup>2</sup> RED argues that appreciable harm for QC's alleged tort claims accrued in late-2014 or by August 27, 2015 since it claims QC believed it had been seriously wronged by the combined actions of ABC Agency and RED by that time. RED's MSJ at 20, ECF No. 86. QC argues that the appreciable harm could not have accrued until at least April 2016 "when it began to suffer harm beyond the increased project costs which QC was entitled to recover via equitable adjustment and which were subject to ongoing negotiations with ABC Agency." QC's Resp. to MSJ at 7, ECF No. 92.

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necessarily bar an accrual until the final decision is rendered by the CO because a reasonable jury could possibly find measurable harm before the final decision.<sup>3</sup>

For example, the following hypothetical is a situation where a reasonable jury could find appreciable harm when QC discovered defects in the preliminary designs in 2014. Here, since QC has demonstrated intentions to quantify the extent the preliminary designs were inadequate, expert testimony could be utilized to approximate a measurable detriment at the time QC alleged the defects existed in 2014. *See id.* at 268–69. Accordingly, since QC alleged a vast number of defects in 2014, a reasonable fact finder could find that QC could have reasonably foresaw that its damages would surpass any equitable adjustment available to it under any administrative remedy. *See id.* at 268–69.

Regarding QC’s other alleged occurrences of harm in its torts claims, using similar reasoning to find measurable harm would be more difficult. For example, quantifying appreciable harm regarding RED’s alleged delays in the approval of final designs under QC’s tortious interference claim would be more difficult. QC’s Resp. to MSJ at 5–6, ECF No. 92. Therefore, a jury may reasonably find that the other alleged tortious actions only caused appreciable harm when QC began to suffer harm beyond the increased project costs as QC argues. *See Salois*, 128 F.3d at 26.

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<sup>3</sup> The court in *Boston Prop.* recognized that a measurable detriment satisfies plaintiff’s knowledge of an appreciable harm. *Boston Prop. Exch. Transfer*, 686 F.Supp.2d 138, 145–46 (D. Mass. 2010). Moreover, the court in *Mass. Elec.* recognized that an appreciable harm occurred before the extent of the harm was determined when filing a law suit clearly would result in the incurrence of substantial expenses. *Mass. Elec. Co. v. Fletcher, Tilton & Whipple, P.C.*, 394 Mass. 265, 268–69 (1985).



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- a. A reasonable jury may find the torts claims are not necessarily tolled until all administrative remedies are exhausted.

Here, QC argues that its claims must be equitably tolled until all administrative remedies were exhausted. QC's Resp. to MSJ at 13, ECF No. 92. However, to support this conclusion, QC cites case law which is not binding on the First Circuit. QC's Resp. to MSJ at 13, ECF No. 92. In contrast to QC's case law, the court in *Holloman* noted that the First Circuit has not "determined whether federal or state equitable tolling principles apply." *Holloman*, 208 F.Supp.3d at 378. Therefore, a reasonable jury could determine QC's claims were not tolled during the time QC sought administrative remedies.

- b. A reasonable jury may find that RED's conduct in tandem with ABC Agency is sufficient to constitute the necessary "lulling" that would grant QC equitable tolling.

Alternatively, a reasonable jury may find that the statute of limitation period must be tolled because RED and ABC Agency "lulled the plaintiff into the false belief that it was not necessary for him to commence action within the statutory period of limitations." *See Deisenroth*, 997 F.Supp. at 157. QC alleges that it engaged with both ABC Agency and RED in its request for equitable adjustment. QC's Resp. to MSJ at 14, ECF No. 92. Further QC alleges that ABC Agency represented to QC that it would consider its submissions in good faith and award equitable adjustments that were justified and reasonable. QC's Resp. to MSJ at 14, ECF No. 92. However, QC claims ABC Agency relied on recommendations from RED that were not based on architectural or engineering standards, and consequently did not provide fair and equitable solutions. *See QC's Resp. to MSJ at 14, ECF No. 92.* Accordingly, a reasonable jury may find that RED's conduct in tandem with ABC Agency is sufficient to constitute the necessary "lulling" and therefore equitably toll QC's accrual of injury. *See Deisenroth*, 997

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F.Supp. at 157. However, because QC only dealt with ABC Agency directly and RED only tangentially as an advisor of ABC Agency during the equitable remedy proceedings, a reasonable jury may alternatively find that RED did not lull QC into any false belief regarding commencing an action, which would mean QC's claims were not tolled. *See id.*

#### Conclusion

For the foregoing reasons, QC's torts claims likely fall within the statute of limitation period.

**Applicant Details**

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 Last Name **Avison**  
 Citizenship Status **U. S. Citizen**  
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**Applicant Education**

BA/BS From **Smith College**  
 Date of BA/BS **May 2018**  
 JD/LLB From **New York Law School**  
[http://www.nalplawschoolsonline.org/ndlsdir\\_search\\_results.asp?lscd=23308&yr=2011](http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23308&yr=2011)  
 Date of JD/LLB **June 1, 2023**  
 Class Rank **5%**  
 Law Review/Journal **Yes**  
 Journal(s) **New York Law School Law Review**  
 Moot Court Experience **Yes**  
 Moot Court Name(s) **New York Law School Moot Court Association**

**Bar Admission**

**Prior Judicial Experience**

Judicial  
Internships/        **Yes**  
Externships  
Post-graduate  
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